

**SODOMY THIRD DEGREE  
(E Felony)  
(Complainant Less Than Seventeen [17];  
Defendant Twenty-one [21] or More)  
PENAL LAW 130.40(2)  
(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, being twenty-one (21) years old or more, he or she engages in deviate sexual intercourse with a person who is incapable of consent by reason of being less than seventeen (17) years old.<sup>1</sup>

I will now give you the meaning of the following terms used in that definition: "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.<sup>2</sup>

Under New York law, a person is INCAPABLE OF CONSENTING to deviate sexual intercourse when that person is less than seventeen (17) years old.<sup>3</sup>

*[NOTE: Add where appropriate:*

It is not a defense to a charge of Sodomy in the Third Degree that the actor did not know that the person with whom the actor had deviate sexual intercourse was less than seventeen (17) years

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<sup>1</sup> The definition of the crime has been modified to incorporate specifically the requirement of incapacity to consent. *See* Penal Law § 130.05(1), (2)(b).

<sup>2</sup>For the definition of "not married," see Penal Law § 130.00(4).

<sup>3</sup>*See* Penal Law § 130.05(3)(a).

old, or that the actor believed that such person was seventeen (17) years old or more on the date of the crime.<sup>4</sup>]

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, each of the following three elements:

1. That on or about (date), in the county of (county), the defendant, (name of defendant), engaged in deviate sexual intercourse with (name of complainant);
2. That the defendant was twenty-one (21) years old or more at that time; and
3. That (name of complainant) was incapable of consent because he/she was less than seventeen (17) years old.

Therefore, if you find that the People have proven beyond a reasonable doubt each of those elements, you must find the defendant guilty 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 any one or more of those elements, you must find the defendant not guilty of the crime of Sodomy in the Third Degree as charged in the \_\_\_\_\_ count.

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<sup>4</sup>See, Penal Law § 15.20(3).