

**SODOMY SECOND DEGREE**  
**(D Felony)**  
**(Incapable of Consent - Mentally Disabled or Incapacitated)**  
**PENAL LAW 130.45(2)**  
**(Committed on or after February 1, 2001)**

The \_\_\_\_\_ count is Sodomy in the Second Degree.

Under our law, a person is guilty of Sodomy in the Second Degree when he or she engages in deviate sexual intercourse with another person who is incapable of consent by reason of being mentally disabled [*or* mentally incapacitated].

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," "incapable of consent," and "mentally disabled" [*or* "mentally incapacitated"].

**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>1</sup>

It is an element of this crime that the deviate sexual intercourse takes place without consent.<sup>2</sup> Deviate sexual intercourse 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 deviate sexual intercourse when he or she is mentally disabled [*or* mentally incapacitated].<sup>3</sup>

**MENTALLY DISABLED** means that a person suffers from a mental disease or defect which renders him or her incapable of

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<sup>1</sup> Penal Law § 130.00(2). For the definition of "not married," see Penal Law § 130.00(4).

<sup>2</sup> See Penal Law § 130.05(1).

<sup>3</sup> Penal Law §130.05(3)(b) and (c).

appraising the nature of his or her conduct.<sup>4</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 without his or her consent).<sup>5</sup>]

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 by reason of being mentally disabled [*or* mentally incapacitated].

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 Second Degree as charged in the \_\_\_\_\_ count.

On the other hand, if you find that the People have not proven beyond a reasonable doubt any either one or both of those elements, you must find the defendant not guilty of the crime of Sodomy in the Second Degree as charged in the \_\_\_\_\_

<sup>4</sup> Penal Law §130.00(5).

<sup>5</sup> Penal Law §130.00(6).

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 charge at 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. Penal Law § 130.16. See charge at the end of this article].*