

**SEXUAL MISCONDUCT**  
**(Sexual Intercourse; Incapacity to Consent)**  
**Penal Law § 130.20 (1)**  
**(Committed on or after Nov. 1, 2003)<sup>1</sup>**  
**(Revised December 2013)<sup>2</sup>**

The (*specify*) count is Sexual Misconduct.

Under our law, a person is guilty of Sexual Misconduct when he or she engages in sexual intercourse with another person without such person's consent.

The following terms used in that definition have a special meaning:

SEXUAL INTERCOURSE means any penetration, however slight, of the penis into the vaginal opening. In other words, any penetration of the penis into the vaginal opening, regardless of the distance of penetration, constitutes an act of sexual intercourse. Sexual intercourse does not necessarily require

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<sup>1</sup> This instruction is effective for crimes committed on or after November 1, 2003, except for the provision set forth in Penal Law § 130.05 (3) (i), which was added by the laws of 2012, chapter 501, effective January 16, 2013, and which is set forth in the text to which footnote 23 is appended.

<sup>2</sup> The revision was to accommodate the statutory addition noted in footnote one. The revision also makes uniform the instructions for article 130 sections regarding people who are incapable of consenting that include as an element that the defendant is not married to the complainant or that contain the statutory defense that the defendant was married to the complainant at the time of the alleged offense (see Penal Law §§ 130.05 [3] and 130.10 [4]). For instances where “not married to the [complainant]” is a statutory element, that language appears in the portions of the instructions that mirror the statutory language of the appropriate subdivision; then, as applicable, that element must be included in the court’s charge. For instances where marriage to the complainant is a defense, the instructions contain a note indicating the circumstances under which the defense applies; if the defense is in issue, the “not married to the [complainant]” element must be included in the court’s charge.

erection of the penis, emission, or orgasm.<sup>3</sup>

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 sexual intercourse when he or she is

[NOTE: Select appropriate alternative:

less than seventeen (17) years old.<sup>4</sup>

It is not a defense to this charge that the actor did not know that the person with whom the actor had sexual intercourse was less than seventeen [17] years old, or that the actor believed that such person was seventeen [17] years old or more on the date of the crime.<sup>5</sup>

or

mentally disabled.<sup>6</sup>

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

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<sup>3</sup> The statutory definition has been amplified in accord with case law (see Penal Law § 130.00 [1]; *People v Liberta*, 64 NY2d 152, 169 [1984]; *People v Williams*, 259 AD2d 509 [2d Dept 1999]; *People v White*, 185 AD2d 472 [3d Dept 1992]; *People v Berardicurti*, 167 AD2d 840 [4th Dept 1990]; *People v Edwards*, 173 AD 375 [2d Dept 1916]).

<sup>4</sup> Penal Law § 130.05 (3) (a).

<sup>5</sup> See Penal Law § 15.20 (3).

<sup>6</sup> Penal Law § 130.05 (3) (b).

<sup>7</sup> Penal Law § 130.00 (5).

*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 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 or supervision of the state department of corrections and community supervision or a hospital,<sup>12</sup> and the actor is an employee<sup>13</sup> who knows or reasonably should know that such person is committed

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<sup>8</sup> Penal Law § 130.05 (3) (c).

<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).

to the care and custody or supervision of such department or hospital.<sup>14</sup>

*or*

committed to the care and custody of a local correctional facility,<sup>15</sup> and the actor is an employee,<sup>16</sup> not married to such person,<sup>17</sup> who knows or reasonably should know that such person is committed to the care and custody of such facility.<sup>18</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>19</sup> not married to such person,<sup>20</sup> 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.<sup>21</sup>

*or*

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<sup>14</sup> Penal Law § 130.05 (3) (e).

<sup>15</sup> If in issue, the definition of “local correctional facility” is set forth in Correction Law § 40 (2).

<sup>16</sup> If in issue, the definition of “employee” is set forth in Penal Law § 130.05 (3) (f).

<sup>17</sup> If in issue, the definition of “married” is set forth in Penal Law § 130.00 (4).

<sup>18</sup> Penal Law § 130.05 (3) (f).

<sup>19</sup> If in issue, the definition of “employee” is set forth in Penal Law § 130.05 (3) (g).

<sup>20</sup> If in issue, the definition of “married” is set forth in Penal Law § 130.00 (4).

<sup>21</sup> Penal Law § 130.05 (3) (g).

a resident or inpatient of a residential facility operated, licensed or certified by (i) the office of mental health; (ii) the office for people with developmental disabilities; or (iii) the office of alcoholism and substance abuse services, and the actor is an employee<sup>22</sup> of the facility not married to such resident or inpatient.<sup>23]</sup>

*[NOTE: In any prosecution under this article in which the victim's lack of consent is based solely on his or her incapacity to consent because he or she was less than seventeen years old; mentally disabled; a client or patient and the actor is a health care provider, or committed to the care and custody or supervision of the state department of corrections and community supervision or a hospital and the actor is an employee add if in issue:*

It is a defense to this charge that the defendant was married to the victim.<sup>24</sup> "Married" means the existence of the relationship between the defendant and the victim as spouses which was recognized by law at the time of the alleged commission of this crime.<sup>25]</sup>

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

Thus, the law deems sexual intercourse with such a person to be without that person's consent, even if in fact that person did consent.

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<sup>22</sup> If in issue, the definition of "employee" is set forth in Penal Law § 130.05 (3) (i).

<sup>23</sup> Penal Law § 130.05 (3) (i). If in issue, the definition of "married" is set forth in Penal Law § 130.00 (4).

<sup>24</sup> See Penal Law § 130.10 (4).

<sup>25</sup> See Penal Law § 130.00 (4). See Domestic Relations Law §§ 15 and 15-a.

In order for you to find the defendant guilty of this crime, the People are required to prove, from all of the evidence in the case, beyond a reasonable doubt, (both/each) of the following (two/three) elements:

1. That on or about (date), in the county of (County), the defendant, (name of defendant), engaged in sexual intercourse with (name of complainant); and
2. That the defendant did so without the consent of (name of complainant) because (name of complainant) was incapable of consent [and]

[Add if applicable:

3. That the defendant was not married to (name of complainant).]

If you find the People have proven beyond a reasonable doubt [both / each] of those elements, you must find the defendant guilty of this crime.

If you find the People have not proven beyond a reasonable doubt [either one / any one or more] of those elements, you must find the defendant not guilty of this crime.

*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 applicable charge from the “additional charges” section 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, and that charge is in the “additional charges” section of this article (See Penal Law § 130.16).*