

**SEXUAL MISCONDUCT**  
**(A Misdemeanor)**  
**(Sexual Intercourse; Incapacity to Consent)**  
**PENAL LAW 130.20(1)**  
**(Committed on or after February 1, 2001)**

The \_\_\_\_\_ 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.

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: "sexual intercourse" and "without a person's consent."

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 erection of the penis, emission, or orgasm. <sup>1</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>2</sup>

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

<sup>2</sup> Penal Law § 130.05(3)(a).

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>3</sup>

*or* mentally disabled.<sup>4</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>5</sup>

*or* mentally incapacitated.<sup>6</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>7</sup>

*or* physically helpless.<sup>8</sup>

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

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

<sup>5</sup> Penal Law § 130.00(5).

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

<sup>7</sup> Penal Law § 130.00(6).

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

PHYSICALLY HELPLESS means that a person is unconscious or for any other reason is physically unable to communicate unwillingness to an act.<sup>9</sup>

*or*

committed to the care and custody of the state department of correctional services or a hospital,<sup>10</sup> and the actor is an employee,<sup>11</sup> not married to such person,<sup>12</sup> who knows or reasonably should know that such person is committed to the care and custody of such department or hospital.<sup>13</sup>

*or*

committed to the care of a local correctional facility,<sup>14</sup> and the actor is an employee,<sup>15</sup> not married to such person,<sup>16</sup> who knows or reasonably should know that such person is

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<sup>9</sup> Penal Law § 130.00(7).

<sup>10</sup> If in issue, the definition of “hospital” is set forth in Correction Law §400(2).

<sup>11</sup> If in issue, the definition of “employee” is set forth in Penal Law §130.05(3)(e).

<sup>12</sup> If in issue, the definition of “not married” is set forth in Penal Law §130.00(4).

<sup>13</sup> Penal Law §130.05(3)(e).

<sup>14</sup> If in issue, the definition of “local correctional facility” is set forth in Correction Law §40(2).

<sup>15</sup> If in issue, the definition of “employee” is set forth in Penal Law §130.05(3)(f).

<sup>16</sup> If in issue, the definition of “not married” is set forth in Penal Law §130.00(4).

committed to the care and custody of such facility.<sup>17</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>18</sup> not married to such person,<sup>19</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>20]</sup>

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

Thus, 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, (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.

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<sup>17</sup>Penal Law §130.05(3)(f).

<sup>18</sup> If in issue, the definition of “employee” is set forth in Penal Law §130.05(3)(g).

<sup>19</sup> If in issue, the definition of “not married” is set forth in Penal Law §130.00(4).

<sup>20</sup>Penal Law §130.05(3)(g).

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 Sexual Misconduct 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 Sexual Misconduct 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 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.]*