

SEXUAL MISCONDUCT
(A Misdemeanor)
(Sexual Intercourse Without Consent;
Incapacity to Consent)
PENAL LAW 130.20(1)
(Committed on or after July 27, 1984)¹

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, TO WHOM HE OR SHE IS NOT MARRIED, without that person's consent.²

I will now give you the meaning of the following terms used in that definition: "sexual intercourse" and "without a person's consent."

SEXUAL INTERCOURSE has its ordinary meaning, and occurs upon any penetration, however slight.³

Sexual intercourse takes place WITHOUT A PERSON'S CONSENT when that person is incapable of consenting. Under our law, a person is incapable of consenting when he or she is

[NOTE: *Select appropriate alternative:*
less than seventeen (17) years old.⁴

(NOTE: *Add where appropriate:*

It is not a defense to a charge of Sexual Misconduct 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

¹*Matter of Jessie C.*, 164 AD2d 731 (1991), decided February 1, 1991, eliminated the gender exemption for sexual misconduct. Accordingly, if a female is charged as a principal, the effective date of the statute is February 1, 1991. The definition of the crime has been modified to make it gender-neutral in accordance with *Matter of Jessie C.*, without eliminating the marital exemption originally incorporated in this section through the definition of "female" in Penal Law § 130.00(4).

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

³*See*, Penal Law § 130.05(2)(a).

⁴*See*, Penal Law § 130.05(3)(a).

crime.⁵⁾

or mentally defective.⁶

MENTALLY DEFECTIVE 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.⁷

or mentally incapacitated.⁸

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).⁹

or physically helpless.¹⁰

PHYSICALLY HELPLESS means that a person is unconscious or for any other reason is physically unable to communicate unwillingness to an act.^{11]}

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), to whom the defendant was not married; and
2. That (name of complainant) was incapable of consent because he/she was less than seventeen (17) years old [*or* mentally defective] [*or* mentally incapacitated] [*or* physically helpless].

⁵See, Penal Law § 15.20(3).

⁶See, Penal Law § 130.05(3)(b).

⁷See, Penal Law § 130.00(5).

⁸See, Penal Law § 130.05(3)(c).

⁹See, Penal Law § 130.00(6).

¹⁰See, Penal Law § 130.05(3)(d).

¹¹See, Penal Law § 130.00(7).

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 (§ 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 defect or mental incapacity, a charge on corroboration is required. See charge at the end of this article.]