

SEXUAL MISCONDUCT
(A Misdemeanor)
(Deviate Sexual Intercourse Without Consent; Incapacity to Consent)
PENAL LAW 130.20(2)
(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 deviate sexual intercourse with another person, without that person's consent.

I will now give you the meaning of the following terms used in that definition: "deviate sexual intercourse" and "without a person's 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.²

Deviate 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.³

(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 deviate 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.⁴)

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 accordingly.

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

³See, Penal Law § 130.05(3)(a).

⁴See, Penal Law § 15.20(3).

or mentally defective.⁵ **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.⁶

or mentally incapacitated.⁷ **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).⁸

or physically helpless.⁹ **PHYSICALLY HELPLESS** means that a person is unconscious or for any other reason is physically unable to communicate unwillingness to an act.^{10]}

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 deviate sexual intercourse with (name of complainant); 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].

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.

⁵See, Penal Law § 130.05(3)(b).

⁶See, Penal Law § 130.00(5).

⁷See, Penal Law § 130.05(3)(c).

⁸See, Penal Law § 130.00(6).

⁹See, Penal Law § 130.05(3)(d).

¹⁰See, Penal Law § 130.00(7).