

**SEXUAL ABUSE FIRST DEGREE**  
**(D Felony)**  
**(Physical Helplessness)**  
**PENAL LAW 130.65(2)**  
**(Committed on or after February 1, 2001)**

The \_\_\_\_\_ count is Sexual Abuse in the First Degree.

Under our law, a person is guilty of Sexual Abuse in the First Degree when he or she subjects another person to sexual contact when the other person is incapable of consent by reason of being physically helpless.

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 contact," "incapable of consent," and "physically helpless."

**SEXUAL CONTACT** means any touching of the sexual or other intimate parts of a person not married to the actor for the purpose of gratifying the sexual desire of either party. It includes the touching of the actor by that person as well as the touching of that person by the actor, whether directly or through clothing.<sup>1</sup>

A person is **INCAPABLE OF CONSENT** when that person is physically helpless.<sup>2</sup>

**PHYSICALLY HELPLESS** means that a person is unconscious or for any other reason is physically unable to communicate unwillingness to an act.<sup>3</sup>

Thus, sexual contact with such a person is always, under

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<sup>1</sup> See, Penal Law § 130.00(3). If in issue, see Penal Law § 130.00(4), for the definition of "not married."

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

<sup>3</sup> Penal Law § 130.00(7).

our law, deemed to be without that person's 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), subjected (name of complainant) to sexual contact; and
2. That (name of complainant) was incapable of consent by reason of being 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 Abuse in the First Degree 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 Abuse in the First Degree as charged in the \_\_\_\_\_ 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 affirmative defense charge at the end of this article.]*