

**SEXUAL MISCONDUCT**  
**(Oral or Anal Sexual Conduct;**  
**Incapacity to Consent)**  
**Penal Law § 130.20 (2)**  
**(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

*Select applicable alternative(s):*  
oral sexual conduct [or]  
anal sexual conduct

with another person without such person's consent.

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

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<sup>1</sup> This instruction is applicable to 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 24 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.

*Select applicable alternative(s):*

[ORAL SEXUAL CONDUCT means conduct between persons consisting of contact between the mouth and the penis, the mouth and the anus, or the mouth and the vulva or vagina.<sup>3</sup>]

[ANAL SEXUAL CONDUCT means conduct between persons consisting of contact between the penis and anus.<sup>4</sup>]

[Oral (or) anal] sexual conduct takes place WITHOUT A PERSON'S CONSENT when that person is deemed incapable of consent. Under our law, a person is deemed INCAPABLE OF CONSENTING to [oral (or) anal] sexual conduct when he or she is

*[NOTE: Select appropriate alternative:*

less than seventeen (17) years old.<sup>5</sup>

It is not a defense to this charge that the actor did not know that the person with whom the actor had [oral (or) anal] sexual conduct 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>6</sup>

*or*

mentally disabled.<sup>7</sup>

MENTALLY DISABLED means that a person

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<sup>3</sup> Penal Law § 130.00 (2) (a).

<sup>4</sup> Penal Law § 130.00 (2) (b).

<sup>5</sup> Penal Law § 130.05 (3) (a).

<sup>6</sup> See Penal Law § 15.20 (3).

<sup>7</sup> Penal Law § 130.05 (3) (b).

suffers from a mental disease or defect which renders him or her incapable of appraising the nature of his or her conduct.<sup>8</sup>

*or*

mentally incapacitated.<sup>9</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>10</sup>

*or*

physically helpless.<sup>11</sup>

PHYSICALLY HELPLESS means that a person is unconscious or for any other reason is physically unable to communicate unwillingness to an act.<sup>12</sup>

*or*

committed to the care and custody or supervision of the state department of corrections and community supervision

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<sup>8</sup> Penal Law § 130.00 (5).

<sup>9</sup> Penal Law § 130.05 (3) (c).

<sup>10</sup> Penal Law § 130.00 (6).

<sup>11</sup> Penal Law § 130.05 (3) (d).

<sup>12</sup> Penal Law § 130.00 (7).

or a hospital,<sup>13</sup> and the actor is an employee<sup>14</sup> who knows or reasonably should know that such person is committed to the care and custody or supervision of such department or hospital.<sup>15</sup>

*or*

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

*or*

committed to or placed with the office of children and family services and in residential care, and the actor is an

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<sup>13</sup> If in issue, the definition of “hospital” is set forth in Correction Law § 400 (2).

<sup>14</sup> If in issue, the definition of “employee” is set forth in Penal Law § 130.05 (3) (e).

<sup>15</sup> Penal Law § 130.05 (3) (e).

<sup>16</sup> If in issue, the definition of “local correctional facility” is set forth in Correction Law § 40 (2).

<sup>17</sup> If in issue, the definition of “employee” is set forth in Penal Law § 130.05 (3) (f).

<sup>18</sup> If in issue, the definition of “married” is set forth in Penal Law § 130.00 (4).

<sup>19</sup> Penal Law § 130.05 (3) (f).

employee,<sup>20</sup> not married to such person,<sup>21</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>22</sup>

or

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>23</sup> of the facility not married to such resident or inpatient.<sup>24]</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>25</sup> "Married" means the existence of

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<sup>20</sup> If in issue, the definition of "employee" is set forth in Penal Law § 130.05 (3) (g).

<sup>21</sup> If in issue, the definition of "married" is set forth in Penal Law § 130.00 (4).

<sup>22</sup> Penal Law § 130.05 (3) (g).

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

<sup>24</sup> Penal Law § 130.05 (3) (i). If in issue, the definition of "married" is set forth in Penal Law § 130.00 (4).

<sup>25</sup> See Penal Law § 130.10 (4).

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>26</sup>]

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

Thus, the law deems [oral (or) anal] sexual conduct with such a person 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 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

*Select applicable alternative(s):*

oral sexual conduct [or]  
anal sexual conduct

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

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<sup>26</sup> See Penal Law § 130.00 (4). See Domestic Relations Law §§ 15 and 15-a.

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. Penal Law § 130.16.*