

**RAPE IN THE THIRD DEGREE**  
**(Oral sexual contact; incapacity to consent)**  
**Penal Law § 130.25 (1)**  
**(Committed on or after Sept 1, 2024)**

The (specify) count is Rape in the third degree.

Under our law, a person is guilty of Rape in the third degree when that person engages in oral sexual contact with another person who is incapable of consent.<sup>1</sup>

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

**ORAL SEXUAL CONTACT** 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>2</sup>

Under our law, it is also an element of this offense that the oral sexual contact was committed without the consent of that other person.<sup>3</sup> Oral sexual contact takes place without a person's consent when that person is deemed by law to be incapable of consent.

---

<sup>1</sup> At this point, the statutory definition continues: “by reason of some factor other than being less than seventeen years old” [Penal Law § 130.25 (1)]. That portion of the statute has been omitted here. Instead, those factors are set forth below in the definition of the term “incapable of consent.”

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

<sup>3</sup> Penal Law § 130.05(1).

Under our law, a person is deemed incapable of consenting to oral sexual contact when that person is:

Select appropriate alternative:

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>

---

<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

*(Insert the appropriate paragraph set forth in Penal Law § 130.05 (3)). **Note:** Some of paragraphs in Penal Law § 130.05 contain a definition(s) of a term(s) used in that paragraph. Some of the paragraphs include a term defined in a separate statute and there is a cross-reference to those definitions. There are three terms used in some paragraphs that are defined in Penal Law § 130.00 which are applicable to Penal Law art. 130, namely: “married” [Penal Law § 130.00(4)]; “health care provider” [Penal Law § 130.00(12)]; “mental health care provider” [Penal Law § 130.00(13)]. If in issue, the applicable definition should be charged.*

*[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>10</sup> “Married” means the existence of the relationship between the defendant and the victim as spouses which was recognized by

---

<sup>9</sup> Penal Law § 130.00(7).

<sup>10</sup> See Penal Law § 130.10 (4).

law at the time of the alleged commission of this crime.<sup>11]</sup>

Note: This is the end of definitions and the resumption of the charge:

Thus, the law deems ORAL sexual contact 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 oral sexual contact 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 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.

---

<sup>11</sup> See Penal Law § 130.00 (4). See Domestic Relations Law §§ 15 and 15-a.

*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 (See Penal Law § 130.16).*