

RAPE IN THE THIRD DEGREE
(Oral Sexual Contact
Lack of Consent - Totality of Circumstances)
Penal Law § 130.25 (8)
(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 he or she engages in oral sexual contact with another person without such person's consent.

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.²

A person engages in oral sexual contact with another person **WITHOUT SUCH PERSON'S CONSENT** when there is a lack of consent to the act.

¹ At this point, the statutory definition continues: "where such lack of consent is by reason of some factor other than incapacity to consent." There are two such factors, forcible compulsion [Penal Law § 130.05(2) (a)] and the conduct set forth in Penal Law §130.05(2) (d).

The conduct set forth in Penal Law §130.05(2)(d) is the focus of this charge and that factor is set forth in the definition of the term "without such person's consent."

If a "forcible compulsion" charge is required, adapt the charge provided for rape in the first degree by forcible compulsion.

² Penal Law § 130.00(2)(a).

Lack of consent results from circumstances under which, at the time of the act of oral sexual contact, the complainant clearly expressed that he or she did not consent to engage in such act, and a reasonable person in the actor's situation would have understood the complainant's words and acts as an expression of lack of consent to such act under all the circumstances.³

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 (defendant's name), engaged in oral sexual contact with (complainant's name); and,
2. That the defendant did so without (complainant's name) consent.

If you find the People have proven beyond a reasonable doubt both 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 or both of those elements, you must find the defendant not guilty of this crime.

³ See Penal Law §130.05(2)(d).