

**AGGRAVATED SEXUAL ABUSE IN THE THIRD DEGREE**  
**(Inserts a Foreign Object; Incapacity to Consent)**  
**Penal Law § 130.66 (2)**  
**(Committed on or after Nov. 1, 2003)<sup>1</sup>**

The (specify) count is Aggravated Sexual Abuse in the Third Degree.

Under our law, a person is guilty of Aggravated Sexual Abuse in the Third Degree when he or she inserts a foreign object in the vagina [*or urethra*] [*or penis*] [*or rectum*] [*or anus*] of another person causing physical injury to such person and when the other person is incapable of consent by reason of being mentally disabled [*or mentally incapacitated*].

Conduct performed for a valid medical purpose does not violate the provisions of this law.<sup>2</sup>

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

**FOREIGN OBJECT** means any instrument or article which, when inserted in the vagina [*or urethra*] [*or penis*] [*or rectum*] [*or anus*], is capable of causing physical injury.<sup>3</sup>

**PHYSICAL INJURY** means impairment of physical condition or substantial pain.<sup>4</sup>

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<sup>1</sup> The terminology “or anus” was added to the definition of this crime in 2010. Thus, the definition, with that term included, is applicable to a crime committed on or after January 7, 2010 pursuant to the laws of 2009, chapter 45. For crimes committed on or after November 1, 1988 and before January 7, 2010, omit that terminology.

<sup>2</sup> Penal Law § 130.65-a (2).

<sup>3</sup> Penal Law § 130.00 (9).

<sup>4</sup> Penal Law § 10.00 (9); See *People v Chiddick*, 8 NY3d 445 (2007).

It is an element of this crime that the insertion of a foreign object take place without consent. Such insertion 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 such insertion when he or she is:

[NOTE: Select appropriate alternative]:

mentally disabled.<sup>5</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>6</sup>

[Add if applicable:

It is a defense to this charge that the defendant was married to the victim.<sup>7</sup> "Married" means the existence of 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>8</sup>]

*or*

mentally incapacitated.<sup>9</sup>

MENTALLY INCAPACITATED means that a person is rendered temporarily incapable of appraising or controlling

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

<sup>6</sup> Penal Law § 130.00 (5).

<sup>7</sup> See Penal Law § 130.10 (4).

<sup>8</sup> See Penal Law § 130.00 (4). See Domestic Relations Law §§ 15 and 15-a.

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

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>

Thus, the law deems insertion of a foreign object in the vagina [*or* urethra] [*or* penis] [*or* rectum] [*or* anus] of 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 (defendant's name), without a valid medical purpose, inserted a foreign object into the vagina [*or* urethra] [*or* penis] [*or* rectum] [*or* anus] of (complainant's name), causing him/her physical injury; [and]
2. That (complainant's name) was incapable of consent by reason of being mentally disabled [*or* mentally incapacitated] [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

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<sup>10</sup> Penal Law § 130.00 (6).

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.*