

SODOMY FIRST DEGREE
(B Felony)
(Physical Helplessness)
PENAL LAW 130.50(2)
(Committed on or after February 1, 2001)

The _____ count is Sodomy in the First Degree.

Under our law, a person is guilty of Sodomy in the First Degree when he or she engages in deviate sexual intercourse with another person who 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: "deviate sexual intercourse," "incapable of consent" and "physically helpless."

DEVIATE SEXUAL INTERCOURSE means sexual conduct between persons not married to each other consisting of contact between the penis and the anus, the mouth and the penis, or the mouth and the vulva.¹

A person is **INCAPABLE OF CONSENT** when that person is physically helpless.²

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

Thus, deviate sexual intercourse with such a person is always, under our law, deemed to be without that person's consent.

¹ Penal Law § 130.00(2). For the definition of "not married," see Penal Law § 130.00(4).

² Penal Law § 130.05(3)(d).

³ Penal Law § 130.00(7).

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), engaged in deviate sexual intercourse with (name of complainant); 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 Sodomy 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 Sodomy 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 charge at the end of this article.]