

**Ala. Code 1975, § 13A-6-65(a)(1)**

**Sexual Misconduct**  
**(Male - Other Than Rape or Fraud)**

The defendant is charged with sexual misconduct.

A person commits the crime of sexual misconduct if being a male, he engages in sexual intercourse with a female without her consent, under circumstances other than those covered by rape in the first or second degree.

To convict, the State must prove beyond a reasonable doubt each of the following elements:

- (1) The defendant engaged in sexual intercourse with **[Insert Victim's name]**;
- (2) The defendant was a male and **[Insert Victim's name]** was a female;
- (3) The defendant did so without her consent;
- (4) The defendant did so under circumstances other than those covered by rape in the first or second degree **[Describe]; (AND)**
- (5) The defendant acted **[Insert appropriate mens rea element - See Use Note]**.

*Sexual intercourse* has its ordinary meaning and occurs upon any penetration, however slight; emission is not required. [13A-6-60(1)]

If you find from the evidence that the State has proved beyond a reasonable doubt each of the above elements of sexual misconduct, then you shall find the defendant guilty of sexual misconduct.

If you find that the State has failed to prove any one or more of the elements of the offense of sexual misconduct, then you cannot find the defendant guilty of sexual misconduct.

**[If lesser-included offenses are included, the Court should instruct on those offenses at this point.]**

**Use Notes**

The statute does not state a specific mens rea element. The Court of Criminal Appeals has concluded that "intent" is not an element of sodomy or sexual abuse. *Allen v. State*, 624 So. 2d 650 (Ala. Crim. App. 1993). Moreover, in interpreting the rape in the first degree statute which also does not establish a specific mens rea element, the courts

have concluded that rape in the first degree does not include "specific intent" as an element. *Anonymous v. State*, 507 So.2d 972 (Ala. 1987); *Toler v. State*, 623 So. 2d 408 (Ala. Crim. App.), cert. denied, No. 1921231 (Ala. 1993).

Insert the appropriate mens rea element considering the indictment and the evidence before the court. There are few, if any, strict liability offenses in the Code. See Commentary for 13A-2-3 and 13A-2-4(b). There are four mens rea elements in the Alabama Code: intentionally, knowingly, recklessly and with criminal negligence. See 13A-2-2.

1. A person acts *intentionally* with respect to a result or to conduct described by a statute defining an offense when his/her purpose is to cause that result or to engage in that conduct. [13A-2-2(1)]
2. A person acts *knowingly* with respect to conduct or to a circumstance described by a statute defining an offense he/she is aware that his/her conduct is of that nature or that the circumstance exists. [13A-2-2(2)]
3. A person acts *recklessly* with respect to a result or to a circumstance when he/she is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation. [13A-2-2(3)]
4. A person acts with *criminal negligence* with respect to a result or to a circumstance when he/she fails to perceive a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation. A court or jury may consider statutes or ordinances regulating the defendant's conduct as bearing upon the question of criminal negligence. [13A-2-2(4)]

It may be necessary to charge the jury on rape in the first or second degree if (1) this instruction is being used as a lesser included offense instruction, or (2) the distinction between the charges must be made to clear up confusion. Sexual intercourse by a male with a female without her consent is sexual misconduct unless additional factors enhance the charge. For example, in the case of a charge of sexual misconduct and a defense of alibi, there is no need to mention rape when explaining sexual misconduct.

[Approved 9-2-15.]