

Alcohol as DFSA

**SART Listserv
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Issue: What states, if any, classify alcohol specifically as an intoxicant used to facilitate sexual assault?

Wisconsin

- Wisconsin just passed legislation. DFSA is included in a subsection of our 2nd degree sexual assault statute. Previously, the definition specifically stated that alcohol in and of itself was not an intoxicant.
- Wis. Stat. Sec 940.225(2): Second degree assault. Whoever does any of the following is guilty of a Class C Felony: Has sexual contact or sexual intercourse with a person who is under the influence of an intoxicant to a degree which renders that person incapable of giving consent if the defendant has actual knowledge that the person is incapable of giving consent and the defendant has the purpose to have sexual contact or sexual intercourse with the person while the person is incapable of giving consent.
- "Intoxicant" means any alcohol beverage, controlled substance, controlled substance analog, or other drug or any combination thereof.

New York: Facilitating a Sex Offense with a Controlled Substance P.L. section 130.90 [a class "D" felony]

The offender knowingly and unlawfully possesses a controlled substance and administers such a substance to another person without such person's consent and with intent to commit against such person conduct constituting a felony defined in Penal Law article 130 and commits or attempts to commit such conduct.
[2] Sex Offenses involving lack of consent based upon mentally incapacitated victim

Where you cannot establish the precise controlled substance utilized or that the defendant administered it, consider charging sex crimes under incapacity to consent by being mentally incapacitated. Significantly, the substance most commonly detected substance in victims of sexual assault is ethanol (alcohol) which is not a controlled substance. Victims may also have voluntarily used 'recreational' drugs prior to the defendant administering the 'date rape' drug.

Penal Law Section 130.00 (6) defines 'mentally incapacitated' as a person who is rendered temporarily incapable of appraising or controlling his or her conduct owing to the influence of a narcotic or intoxicating substance administered without consent.

Sex Offenses Involving Lack of Consent based upon Physically Helpless Victim: Penal Law section 130.00(7) Physically helpless is a person who is "unconscious or for any other reason is physically unable to communicate unwillingness to an act."

a. Rape – first degree- (Penal Law section 130.35 (2)] a class "B" felony: When the offender engages in sexual intercourse with another person who is incapable of consent by reason of being physically helpless.