

Felony Settlement Conference Policies & Procedures



NH Superior Court
December 2015

Introduction

Beginning in 2012, the New Hampshire Superior Court Felony Settlement Conference Program was founded to provide a meaningful alternative path to resolution of criminal cases in New Hampshire. The following policies and procedures are the result of experience and input from multiple stakeholders to the program, and a direct contribution of dedicated defense attorneys, prosecutors and victim-witness advocates who volunteered their time to collaborate on this project. The outcome is a comprehensive set of policies that represents the interests of everyone participating in the Felony Settlement Conference Program, indeed providing a realistic path to resolution of appropriate criminal cases in the New Hampshire Superior Court.

Tina L. Nadeau, Chief Justice
New Hampshire Superior Court

NEW HAMPSHIRE SUPERIOR COURT FELONY SETTLEMENT CONFERENCES

The New Hampshire Superior Court has established a Felony Settlement Conference Program in order to provide an avenue of negotiation between parties and settlement of criminal cases. Settlement conferences may be used for evaluative, facilitative, and restorative justice purposes, and will assist negotiations between the parties to criminal cases when the parties have been unable to reach a negotiated disposition. Settlement conferences do not serve the purpose of starting negotiations, but rather provide a forum in which to further negotiations and/or bring together concerned parties to reach resolution. Both the prosecutor and defense counsel must agree to participate in the settlement conference and, except by agreement of the parties, settlement conferences may only be requested after the State and Defendant have each made a good faith offer for a negotiated resolution of the case and have had an opportunity to discuss the proposed dispositions with their respective constituent(s) or client. Specifically, the request for a settlement conference may be made after the State has complied with the victims' rights statute or made what it deems to be reasonable efforts to do so, and defense counsel has discussed the State's offer with the Defendant and a counteroffer is made and the State has had an opportunity to respond.

Settlement conferences are conducted by retired and senior associate New Hampshire Superior Court judges or active judges who have not had and will not have any contact with the case. Settlement conferences may be conducted at any time in the process of a case, and the Court will schedule the settlement conference at least two weeks out from the filing of the request in order to allow parties and participants to prepare for the conference. The Settlement Conference Request Form (Attachment A) will indicate the purpose of the settlement conference (evaluative, facilitative, or restorative), minimal case information and status of plea negotiation. A settlement conference memorandum will be filed by both the State and the defense counsel with the Court not less than five days in advance of the settlement conference. These memoranda will contain more detailed case information, a list of participants, and specifically, what issues, questions, and/or additional information are anticipated to be part of the conference (i.e. proposed dispositions, apology from defendant, questions from victims, etc.).

Types of Settlement Conferences

Three types of settlement conferences have been defined as follows:

Evaluative: this type of settlement conference is primarily for the lawyers to obtain the opinion of a judge regarding the posture of their case. This type of conference may be useful to parties who want a better idea of what value a judge will place on the case and to seek input from the settlement judge on legal issues pertaining to the case. Parties requesting this type of conference feel that it would be beneficial for the settlement judge to evaluate the case, to point out strengths and weaknesses in the case and to make recommendations to each party with the goal of settling the case. Unless by agreement of the parties, it is expected that an evaluative settlement conference will occur after initial negotiations between the parties. It is anticipated that the participants in this conference would include the settlement conference judge and attorneys. The defendant's presence would not be required and there would be no other active participants.

Facilitative: this type of settlement conference may be utilized when reasonable efforts at plea negotiation have been made, but progress towards a negotiated disposition has not been made. Mandatory negotiation before this type of settlement conference is not required if the defendant refuses to make a counteroffer. Parties requesting this type of settlement conference request that the settlement judge facilitate negotiations by asking questions, determining what interests are most important to each party, and helping the parties to find options to satisfy these interests. This type of conference may be useful to educate a defendant. In addition to the State, defense counsel, defendant, and victim/witness advocate, it is the victim's right to be present and participate (if he or she chooses) in the facilitative settlement conference. Other participants may include anyone else with a stake in the case who may appropriately contribute to the conference (police, counselors, community official/members, family members of defendant, etc.).

Restorative: this type of settlement conference is intended to be used in cases where a defendant is accepting responsibility for his or her actions and is going to plead guilty to the charges at hand. The parties should be near to a resolution, but not have terms fully negotiated. Parties requesting this type of conference request that the settlement judge create an opportunity for victim impact to be shared in a more personalized environment and victim concerns and questions to be explored and answered. This type of conference offers an opportunity to

offenders to demonstrate responsibility through an accountability statement/apology. In addition to the State, defense attorney, defendant, and victim/witness advocate, it is the victim's right to be present and to participate if they choose to do so. Others with a stake in the case or who may appropriately contribute may also participate (police, counselors, community official/members, family members of defendant, etc.).

Settlement Conference Procedure

The settlement judge facilitates the conference, performing a role similar to that of a mediator in a civil case. The settlement judge does not make any decisions and must be careful not to appear to coerce either side in reaching an agreement. With the agreement of the parties and compliance with RSA 21-M:8-k, the NH Victims' Bill of Rights, the settlement judge may take the defendant's plea or under unusual circumstances, a further settlement conference may be scheduled. However, upon conclusion of the settlement proceedings and/or the defendant's plea and sentencing, the settlement judge will have no further contact with the case. Settlement conferences are confidential plea negotiations, within the meaning of Rule of Evidence 410, and neither the parties nor the settlement judge may disclose the contents of the settlement conference to the trial judge or any other person.

Evaluative Settlement Conferences will involve the attorneys and the settlement judge only. This conference may take place in chambers or in another private space with the judge. Prior to the start of the settlement conference, parties will agree whether the conference will be held on the record or not.

Facilitative and Restorative Settlement Conferences suggested format is as follows:

1. The judge will meet informally with counsel and victim/witness advocate in chambers prior to the settlement conference. A brief overview of issues or reasons for the conference may be reviewed and the judge will be made aware of any updates in the information provided in the settlement conference memoranda. The format of the conference will be reviewed and the victim/witness advocate may provide input regarding concerns and/or special considerations for a participating victim. If there are to be any ex parte communications during the settlement conference or special format arrangements, this should be discussed and agreed upon during the chambers conference.
2. The settlement conference itself should be held on the record to avoid potential claims of coercion, ineffective assistance of counsel or false promises. This record will be sealed after the conference.

3. The settlement conference is confidential. Nothing said during the conference may be used as evidence in trial, nor may the contents of the conference be disclosed to the trial judge or any other person. Prior to beginning the settlement conference, the parties must waive the applicability of Superior Court Rule 98 to statements made during the proceeding. The only exceptions to the policy of confidentiality (including for exculpatory evidence) are those outlined in the Settlement Conference Confidentiality Policy (Attachment B).
4. The judge begins the settlement conference by introducing herself/himself to the defendant, victim and any other attendees. The judge then explains the purpose of the settlement conference and the process, including the informal, interactive nature, and defendant's confidentiality protections. The judge emphasizes that the defendant is participating voluntarily and that his participation has no bearing on his right to have a trial by jury. The judge should query the defendant to ensure he understands that by participating in a settlement conference, he is not giving up his rights to a jury trial. The defendant is also asked if he understands and agrees to the process. The judge shall confirm compliance with the victims' rights statute by querying the State. The judge shall advise the defendant and the State that by agreeing to participate in the settlement conference, they are waiving their right to discovery of statements made during the conference and agreeing to abide by the Settlement Conference Confidentiality Policy.
5. The judge next reviews the charges against the defendant and the maximum penalties for each offense. After assuring that the defendant understands the charges and potential sentence and has no questions, the judge asks the prosecutor to give an offer of proof as to each charge and to set forth the recommended sentence and the reasons for the recommendation, including any applicable office policies, sentences for similar crimes, aggravating and/or mitigating facts of this crime, etc.
6. The judge shall seek input from the victim or Victim/Witness Advocate at this point or may defer this until after defense counsel and defendant have a chance to speak. This

communication may occur without defense counsel and defendant present if requested by the victim or Victim/Witness Advocate and agreed to by the parties. Flexibility in how this portion of the settlement conference transpires should be offered to ensure compliance with the victims' rights statute.

7. Defense counsel and the defendant have the opportunity to present their case. This may include any mitigating factors of the crime itself, information about the defendant's personal history and circumstances, any efforts the defendant has already taken to rehabilitate herself/himself, and any facts that would support an inference that defendant will no longer be involved in the criminal justice system. Defense counsel may also suggest an appropriate sentence under all of the circumstances. The prosecutor and/or judge may question the defendant about any of the information provided by the defendant or counsel.

8. After all attendees have spoken and asked questions, counsel may at that point agree on an appropriate sentence recommendation or the settlement judge may meet with each side privately. These individual meetings are not ex parte communications under the rules of judicial or professional ethics because the role of the settlement judge is that of a facilitator and not a judicial officer. Depending upon what transpires during the individual conferences, both sides may or may not meet together again with the settlement judge. If the parties reach a negotiated plea, they may further agree to have the settlement judge take the plea at that time or a later time. The settlement judge recognizes it is a victim's right to be present for a plea and sentencing. The settlement judge will ensure compliance with the victims' rights statute before taking a defendant's plea. If no agreement is reached, the case continues as scheduled and the settlement judge shall have no further contact with the case unless so requested by the State and Defense.

At the conclusion of all types of settlement conferences, a standard Settlement Conference Report Form (Attachment C) will be completed by the Settlement Conference Judge.

ATTACHMENT A

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
<http://www.courts.state.nh.us>

Court Name: _____
Case Name: _____
Case Number: _____
(if known)

SETTLEMENT CONFERENCE REQUEST

1. Attorney for the State: _____
2. Attorney for Defendant: _____

Before requesting a settlement conference, the parties must make reasonable efforts to come to a negotiated disposition of the case. Where negotiations have been tried and failed, by agreement, a settlement conference may be requested by either party to the court. The parties must consent before a settlement conference is requested.

3. Pending charges: _____

4. Has the State made an offer? Yes No

5. Has Defendant made a counter offer? Yes No

6. Have parties exhausted avenues of discussions of these proposed dispositions?
 Yes No

7. Purpose/type of settlement conference (check one)
 Restorative justice
 Facilitation of negotiations because parties cannot reach agreement on their own
 Evaluation of legal issues

8. If the case involves an alleged victim, will he or she appear or be available for conference? Yes No

9. Will other witnesses or people appear at the request of the State? Yes No

10. Will other people or witnesses appear at the request of the Defendant? Yes No

11. Parties waive applicability of Superior Court Rule 98 to statements made during the settlement conference and agree to abide by the Settlement Conference Confidentiality Policy.
 Yes No

Parties must file memoranda not less than five days in advance of the settlement conference. In its memorandum, each party shall include its proposed disposition of the case. If not previously done, the memoranda shall also include notice of whether the alleged victim will participate and any other witnesses that will attend for the State or the Defendant.

Settlement conference to be held on: _____

Date

Attorney for the State

Date

Attorney for the Defendant

So Ordered.

Date

Signature of Justice

ATTACHMENT B

Superior Court Settlement Conference Confidentiality Policy

- 1.1 **Terms:** The following words and phrases when used in this policy shall, for the purpose of this policy, have the meanings respectively ascribed to them in this policy, except where the context otherwise requires.
- 1.1.1 **Evaluative Settlement Conference:** “Evaluative Settlement Conference” shall have the same meaning set forth in the Superior Court Settlement Conference Policies.
- 1.1.2 **Facilitative Settlement Conference:** “Facilitative Settlement Conference” shall have the same meaning set forth in the Superior Court Settlement Conference Policies.
- 1.1.3 **Party:** “Party” or “Parties” shall mean any attorney for the State, any person, such as a Victim/Witness Advocate, employed by the prosecutor’s office, the Defendant, any attorney for the Defendant, and any person, such as an investigator, employed by any attorney for the Defendant.
- 1.1.4 **Participant:** “Participant” shall mean any person who is present (physically, telephonically, or otherwise) during any portion of the settlement conference, regardless of whether such person is a party and regardless of whether such person speaks during the settlement conference.
- 1.1.5 **Restorative Settlement Conference:** “Restorative Settlement Conference” shall have the same meaning set forth in the Superior Court Settlement Conference Policies.
- 1.1.6 **Settlement Judge:** “Settlement Judge” shall mean any justice of any court or any court appointed mediator who presides over any portion of any settlement conference.
- 1.1.7 **Trial Judge:** “Trial Judge” shall mean any justice who hears any proceeding in a case except for a settlement conference or proceeding regarding confidentiality of the settlement conference.
- 1.1.8 **Victim:** “Victim” shall have the same meaning set forth in RSA 21-M:8-k, I(a).
- 1.2 **Purpose of Confidentiality:** The purpose of a settlement conference is to encourage a full and frank discussion of the strengths and weaknesses of each party’s case in order to facilitate voluntary settlement of cases. In order to facilitate this discussion, settlement conferences must be confidential, both from the public at large and from the judge who eventually presides over a trial or plea. Additionally, in order to encourage settlement of claims, parties must be able to disclose information in the settlement conference without fear that such information will later be used in a trial or sentencing. By voluntarily participating in a settlement conference, participants must agree that statements, documents, and other information disclosed in settlement conference will *generally not be admissible* in any other proceeding or subject to disclosure to any person, including the trial judge, who is not a participant in the settlement conference.
- 1.3 **Confidentiality of Settlement Conference Proceedings**
- 1.3.1 **Generally:** Settlement conferences are confidential. Statements made by any participant in the settlement conference shall not be disclosed by any participant to any other person, including the trial judge, nor shall they be admissible at any other proceeding involving the same parties, except as provided for in this policy. No participant shall communicate any of the substance of the settlement discussions to the trial judge or to any other person.

- 1.3.2 Communications between One Party and/or Participant and the Settlement Judge:** Unless the parties consent, the Settlement Judge shall not speak to one party or participant without the presence of all other parties. With the prior consent of both parties, the Settlement Judge may speak confidentially with one party and/or one party and another participant. Such communications shall not be disclosed to other participants without the consent of the party involved in the communication. Nothing in this section shall be construed, however, as permitting the Defendant to be questioned outside the presence of his attorney, nor shall it be construed as permitting the settlement judge to question the victim outside the presence of an attorney for the State and/or the Victim/Witness Advocate.
- 1.3.3 Communications between the State and Victims or Witnesses:** Nothing in this section shall be construed as requiring the presence of the settlement judge or the other party during communications between the State and the victim or witnesses, even if such communications occur during a settlement conference.
- 1.3.4 Communications between the Defendant's Attorney and the Defendant or Witnesses:** Nothing in this section shall be construed as requiring the presence of the settlement judge or the other party during communications between the Defendant's Attorney and the Defendant or a witness, even if such communications occur during a settlement conference.
- 1.4 Confidentiality of Settlement Conference Documents:** All documents related to the settlement conference shall be kept under seal and shall not be placed in the public court file. Settlement conference documents shall also be sealed from the trial judge. Settlement conference materials shall not be unsealed except as provided for in these policies.
- 1.4.1 Settlement Conference Memoranda:** The parties may submit settlement conference memoranda to assist the settlement judge. Except as provided for in this policy, such memoranda shall be served on the opposing party.
- 1.4.2 Confidential Settlement Conference Memoranda:** If the parties consent, the settlement conference judge may request confidential memoranda regarding the parties' negotiating positions, goals for the settlement conference, or other information that may be useful to the settlement judge but that the parties would not be likely to disclose to the other party. If the settlement judge requests confidential memoranda, the memoranda should be clearly labeled as "Confidential Settlement Conference Memorandum - Ex Parte and Under Seal." The memoranda shall be filed under seal and not disclosed to anyone other than the settlement judge.
- 1.5 Waiver by State and Defendant:** Before beginning any settlement conference, the State and the Defendant shall waive the application of Superior Court Rule 98 (and any orders or local rules related to discovery) to statements made during the settlement conference and shall agree to the confidentiality policies described here.
- 1.6 Exceptions to Confidentiality**
- 1.6.1 Results:** Participants may disclose to the trial judge or another person whether a settlement conference was held and whether a plea agreement or other settlement resulted from a settlement conference, provided, however, that the results of a settlement conference are not admissible as evidence in any criminal or civil proceeding unless permitted by Rule of Evidence 410.

- 1.6.2 As Part of a Plea Agreement:** Participants may disclose information learned during a settlement conference if such disclosure is specifically permitted as part of a plea agreement between the parties.
- 1.6.3 By Consent:** Participants may disclose information learned during a settlement conference or documents prepared for a settlement conference if both parties consent and the disclosure is approved in writing by either the settlement judge or the trial judge.
- 1.6.4 For Appeal Purposes:** The policy does not prohibit disclosure of information related to a settlement conference for the purposes of an appeal or other litigation relating to the validity of a plea resulting from a settlement conference.
- 1.6.5 For Research Purposes:** Participants may disclose the results of a settlement conference and discuss the settlement conference process for the purpose of research and/or evaluation of the process, provided that the research and the information to be disclosed have been approved by a justice of the Superior Court.
- 1.6.6 When Required by Law:** Participants may disclose information learned during a settlement conference when such disclosure is otherwise required by the United States or New Hampshire Constitutions or other applicable law.
- 1.6.7 Limitations of Confidentiality:** This Policy does not require the exclusion of any evidence otherwise admissible, nor does it prohibit disclosure of information which a party learned outside of a settlement conference, merely because it is presented in the course of a settlement conference.
- 1.7 Trial Judge:** The trial judge shall not participate in any settlement conference. With the consent of both parties and upon compliance with RSA 21-M:8-k, the settlement judge may take a Defendant's plea and pass sentence.
- 1.8 Record of Settlement Conference:** Facilitative and Restorative Settlement Conferences shall always be conducted on the record and the settlement judge shall advise all participants that the proceedings are recorded. Evaluative Settlement Conferences may be recorded if requested by the parties. The record of the settlement conference shall be kept under seal and shall not be disclosed to any person except upon order of the Court and in compliance with this policy.
- 1.9 Cases Involving Co-Defendants:** Cases involving co-defendants present a special challenge to the settlement conference model because, while a defendant may waive his own right to obtain or use certain evidence as to himself, he cannot waive those rights as to his co-defendant. In particular, the co-defendant of a settlement conference participant may be entitled to obtain statements of participants, including his co-defendant, under Superior Court Rule 98. Therefore, the Court shall not permit settlement conferences in cases involving co-defendants unless the co-defendants waive their discovery rights as provided in this section.
- 1.9.1 Waiver of Right to Discovery of Co-Defendant Settlement Conference:** A defendant has no obligation to waive his right to discovery of his co-defendant's settlement conference. He may, however, choose to waive his right to discovery of his co-defendant's settlement conference. Such a waiver is valid only if made in writing and on the record and only after the Court has advised him of his rights under the relevant rules of discovery, orders, and laws.

1.9.2 Limitation on Waiver: A defendant's waiver of discovery rights as to a co-defendant's settlement conference shall not be construed as a waiver of his right to obtain and present exculpatory evidence under the New Hampshire and United States Constitutions, even if that exculpatory evidence is discussed or disclosed at the co-defendant's settlement conference.

1.10 Interaction With Other Rules

1.10.1 Rules of Evidence 408 and 410: Settlement conferences are "compromise negotiations" within the meaning of Rule of Evidence 408 and "plea discussions" within the meaning of Rule of Evidence 410. Statements made by any participant during settlement conferences are inadmissible at any criminal or civil proceeding, except as provided for in those rules or in this policy.

1.10.2 Constitutional Right to Obtain and Present All Proofs Favorable: Nothing in this policy should be construed to limit the Defendant's right to obtain and/or use exculpatory evidence within the meaning of Brady v. Maryland, 373 U.S. 83 (1963), State v. Laurie, 139 N.H. 325 (1995), and their progeny, even if that evidence is disclosed in the context of a settlement conference.

1.10.3 Victim's Rights: Nothing in this policy should be construed to limit the State's ability to communicate with the victim of an offense or any of the victim's rights under RSA 21-M:8-k.

1.11 Disputes Regarding Confidentiality of Settlement Conference Information: When possible, disputes about whether information from a settlement conference is subject to disclosure under these rules should be heard and decided by the settlement judge. In all cases, disputes about disclosure of settlement conference information shall be heard under seal and shall not be heard by any justice who may preside over the Defendant's trial and/or sentence the Defendant.

1.11.1 Immediate Review Following Settlement Conference: Immediately following every settlement conference, the settlement conference judge shall inquire of the parties whether they believe any information disclosed during the conference is exculpatory and subject to disclosure under Brady v. Maryland, 373 U.S. 83 (1963), State v. Laurie, 139 N.H. 325 (1995), and their progeny. If either party believes that information disclosed during the settlement conference is subject to disclosure, the settlement judge shall review the information in question, hear argument from the parties, and determine whether the information is subject to disclosure. If the information is subject to disclosure, the settlement judge shall issue appropriate orders regarding the scope and form of the disclosure. At the request of either party, the settlement judge shall make findings of fact and rulings of law sufficient to permit appellate review of the determination of whether information is subject to disclosure.

1.11.2 In Camera Review: If necessary to determine whether information from a settlement conference is subject to disclosure, the justice hearing the issue may conduct an *in camera* review of the settlement conference record. In no case should settlement conference material be disclosed to a non-participant unless the Court has determined, following an *in camera* review, that the information requested is required to be disclosed by this policy or applicable law.

ATTACHMENT C

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
<http://www.courts.state.nh.us>

Court Name: _____
Case Name: _____
Case Number: _____
(if known)

SETTLEMENT CONFERENCE REPORT

1. Date of Settlement Conference: _____

2. Name of Settlement Conference Judge: _____

3. Status of Case:

- Case settled.
- Case did not settle.
- Case continued for further Settlement Conference Proceedings
Date and time of next proceeding (if established): _____

Date

Signature of Justice