

CONFIRMING MEMO
(Informal Meeting)

FROM: _____
(Company Name)

(Address - Number and Street)

(Address - City, State, Zip)

OUR JOB NO: _____

PROJECT: _____
(Name)

(Project Address - Number and Street)

(Project Address - City, State, Zip)

TO: _____
(Contact Person)

(Company Name)

(Address - Number and Street)

(Address - City, State, Zip)

YOUR JOB NO.: _____

SENT **(e-mail):** _____

(mail): _____

(fax): _____

This is to confirm a meeting at _____
between _____ and _____ in which the
following as said and/or agreed:

Additional page(s).

If we do not hear from you otherwise in writing, it is assumed the above statements are true and we will proceed accordingly.

DATED: _____

(Signature)

By: _____
(Print Name and Title)

Instructions for Confirming Memo (informal meeting)

In the form titled: "Agenda and Minutes of Meeting (L9)", you are dealing with a formal meeting with detailed notes taken, advanced notice, and an agenda. In the form titled: "Minutes of Meeting (L-10)", you are dealing with a meeting that has been set up in advance, although it is much more informal.

In the current form titled: "Confirming Memo (informal meeting) L-11", you are literally dealing with an unplanned, spur-of-the-moment meeting which may only be a few minutes in duration. An example would be running into the design professional, owner representative, prime contractor superintendent, or other person on the job site and having a relatively short meeting. Do not be tempted into thinking such meetings are inconsequential. If you end up in litigation or arbitration, these brief encounters suddenly spring forward in importance. You will then be quizzed, either at a deposition or trial, with such questions as: "Who was present at this meeting?"; "What date and time?"; "How long was the meeting?"; "Where did it take place?"; "What was the purpose of the meeting?", etc. With the preliminaries taken care of, the opposing attorney will then really get down to work and grill you on the specifics as to what was said, by whom, and of course your response. Inevitably, they will ask if you took any notes or wrote any confirming letters. If you pull out a copy of this form that was filled out at the meeting or shortly thereafter, you'll be surprised how fast you can "shut-up" the other side and hopefully prevail in your case.

To play it even safer, if you know there is going to be a meeting, take the Memo form along with you and take notes as you are talking. Write down exactly what is said; no more or less. There was a major construction lawsuit once in which the parties differed greatly as to a conversation that took place at an airport coffee shop in the mist of a rather heated project between the owner's representative and the prime contractor's job foreman. At issue was the prime contractor performing almost \$200,000 worth of change orders that the owner later refused to pay. Through some stroke of luck, they were both feeling quite amiable at a meeting in Dallas and while they were talking, the foreman jotted down notes on a blank envelope he had carried in his pocket. The owner rep clearly saw what he was writing down during the conversation. At the end, the foreman, without saying a word, initialed the bottom and put the envelope in front of the owner representative, handing him the pen. Not wanting to be appear uncooperative, the rep initialed it and they shook hands. You can do the same thing with this Memo.

At trial, the rep denied pretty much everything that had been discussed at the meeting and had forgotten that he had initialed the envelope. The prime contractor's attorney, after listening patiently to what the rep said at trial on direct examination (which completely ignored the agreement reached as stated on the envelope), cross-examined the rep as follows:

"So everything you have told us thus far is complete and accurate as to what was agreed upon?"

And you haven't left anything out, right?"

All of these facts are based upon your best recollection and under oath, correct?

And you wouldn't leave out any important details, would you?

Now, I assume you are like the rest of us and your memory fades over time? And the best evidence of a conversation would be notes someone may have taken at the time of the conversation, right?

Mr. Johnson, I'm giving you one more opportunity and ask you: is it not true that my client's version of the facts is more accurate than yours?

(After "fencing him in" and allowing him the arrogance of insisting he was the only one telling the truth, the lawyer began to tighten the noose).

Mr. Johnson, do you remember having a conversation about the seven change orders with my client in the coffee shop of the Dallas International Airport on the afternoon of July 20, 2005, while you were both waiting for your transfer flights?

Mr. Johnson, I'm going to hand you a copy of exhibit 72 and ask if you can identify it for us (after hesitation and his complexion turning somewhat pale, he reluctantly identifies it as the notes in question).

These notes are a true and accurate reflection of the agreement you had as to the change orders, correct?

Calling your attention to the notes that say: ".", isn't it true that they are absolutely contrary to what you have just told us under oath?"

End of case. This could just as easily have been done with this Memo.

But doesn't this require a lot of needless paperwork? Absolutely not. The whole purpose of this form is to allow you to quickly, either in longhand or by typing in the information in the PDF file, confirm a conversation. Simply fill it out after you get back to the office that evening and you're done with it. Or keep some copies in your truck—pull the Memo out, attach it to your clip board, and fill it out as you are talking.

But should you give copies to the people who were at the informal meeting as well as the other important persons involved in the project? Exactly. That is the whole idea. You can either: 1) mail a copy, 2) fax a copy, 3) or use it as an attachment to an e-mail .

Cover letter if you mail it: You can take the simple approach and put a "post it" sticky note on a copy of the form, stating something like: "Hi John (or John Hopkins if you do not know him that well), here are notes of our discussion on 7/12 for your file—let me know if anything else comes up. Frank Johnson." Or, you can write a quick letter with your company letterhead and attach a copy of the Memo. Include in your letter some uncontroversial statements about the project that no one would dispute. You want the people reading this letter to think you are writing them primarily because of those undisputed issues and while

you're at it, almost as an aside, you are mentioning the Confirming Memo. That cover letter might state something like:

"I spoke with the Acme Supply House about the backorder for the second story support girders. They say they will have all 12 of them shipped out in about a week on a rush basis. Did you get my revised shop drawings? (note: this is the uncontroversial part).

I'm also enclosing a Memo of our last a discussion for your file. Thanks again for your input and cooperation."

Fax cover sheet. Be brief in this cover sheet and say something like: "Enclosed is a Memo that sets out what we spoke about on 7/12. Thanks for your cooperation".

E-mail with the Memo as an attachment. Be equally as brief and write something like: "I'm glad we were able to talk about the stairway on Wednesday. To help us remember what was said, I've enclosed a short Memo as an attachment. Thanks for all your help".

Some people are wary of receiving these confirming memos because they think "you're up to something" (for example . . . "I wonder why he is going to the time of sending me this? Is he trying to prove his case in court? Is he trying to find a way to get paid extra? Did his attorney tell him to write this? . . ."). However, if there is not yet a dispute or pending litigation between the parties, it might even be welcomed--seen as coming from someone who is organized and simply helping people remember what was discussed. But, bear in mind the reality of what is going on here: the whole purpose is to help your position and eliminate future disputes. Sometimes this can only be done with the help of some creative camouflaging. For this reason, candidly, you are betting on the fact that they will receive the Memo and not object to it. This can be powerful evidence later before a judge or arbitrator; namely they had a chance to object but did not. Especially since the end of the Memo says that if we do not hear from you to the contrary, it is assumed the statements are true.

If you are in the midst of a healthy dispute, it becomes more complicated. The other side can usually figure out what you're up to and it typically engenders writing you back their own letter disputing what you said. For this reason, it is absolutely crucial that you confirm the conversations on a purely factual basis without editorializing or pressing your opinions. The more neutral you keep it, the better chance it will be accepted.

Here is an example. Assume you are a steel fabricator and have installed an elaborate stairway into a commercial building. It was fabricated exactly according to the drawings, but unavoidably, it does not and fit tightly into the structure. There are two things you would like to have an agreement on : 1) get them to confirm you did everything you were supposed to do from the shop drawings and it was someone else's fault that it does not fit and 2) when you re-fabricate, you should be entitled to additional compensation. Assume in a meeting at the site it was readily agreed, in the presence of the project engineer and the job superintendent for the prime contractor, that the fabrication was done according to those drawings and it was not your fault that it that does not fit. On the other hand, no one agreed at that point to give you a change order. Don't be greedy, this alone is quite a concession

and so your Memo should not discuss additional compensation (which was never agreed at the meeting), but more modestly confirm it was not your fault (which in essence sets-up that additional compensation). The Memo might say:

“Minutes: Discussed why the bottom treads of the stairway are not flush with the wood flooring or landing. Project engineer Markus Allen visited the site yesterday and looked at the installed stairway. After reviewing the original shop drawings, he noted the flooring was approximately 4 in. too low because of the changes made in the foundation work at the basement. He will come up with revised drawings and let us know how to proceed”.

I know it's tempting, but the worst thing you could do is put an additional sentence that says : “The framer misread the plans on sheet A-7 and constructed the floor too low after finishing the foundation work “. All this will do is set up a tempest with different people now covering themselves by sending a bunch of letters in effort to cover their failings and blaming it on someone else. In the midst of this dogfight, no one is willing to admit anything, even the simple facts as reflected in your Memo.

So, keep it simple, uncontroversial, and send it out promptly after the discussion.