

# That's not what I meant

## How to fix a typo or grammatical error in a contract

Everyone makes mistakes, including lawyers and businesspeople drafting contracts. Usually, a simple typographical or grammatical mistake will not change the meaning of the agreement in a significant way — but what if it does?

“While Illinois courts protect the sanctity of the written word, they also recognize that people make mistakes, and they are willing to reform or rewrite the contract to conform to the parties’ agreement in certain circumstances,” says Rebekah Parker, an associate at Novack and Macey LLP.

*Smart Business* spoke with Parker about what to do when writing fails to reflect the parties’ agreement.

### What is contract reformation?

Contract reformation is an equitable remedy that changes the language of a contract so that it conforms to the agreement actually reached by the parties but not accurately reduced to writing because of a mistake. Contract reformation cannot be used to change the terms of the deal; rather, it merely fixes a mistake so that the writing better expresses the bargain the parties reached.

### Can any mistake be reformed?

No. Reformation is most appropriate for scrivener’s or drafting errors, such as erroneous numerical figures, incorrect dates or errant commas that change the meaning of a sentence.

If all contracting parties agree that a mistake has been made, they may — but do not have to — seek court intervention to reform their agreement. Or, they can voluntarily reform the contract themselves. This can be accomplished by, among other things, correcting the language on the original contract and having each party

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initial the revision; executing a rider to the agreement that identifies and corrects the mistake; or executing a new version of the contract that clearly states that it is intended to reform the parties’ prior agreement.

Courts encourage voluntary reformation and will usually enforce the reformed agreement should a dispute later arise.

### What if the parties disagree about whether a mistake was made?

If a mistake advantages one party and disadvantages the other, it is not unusual for them to disagree as to whether a mistake was made. The disadvantaged party may need to bring a legal action for reformation, which can be combined with a claim for breach of contract — even if the breach of contract claim depends upon the contract being reformed. It is important that such a claim be brought as soon as possible after the mistake is discovered, because laches — unreasonable delay accompanied by prejudice — is a common defense to reformation.

The party seeking reformation bears the burden of proof, and it is a heavy one. In Illinois, there is a presumption that a written instrument reflects the true intention of the parties. Overcoming that presumption generally requires ‘clear and convincing evidence’ — a higher burden than the usual preponderance of the evidence standard.

Even if the party seeking to reform a contract fails to meet its heavy burden, it can still succeed on its breach of contract claim if the court finds the agreement to be ambiguous. In that case, the parties can introduce extrinsic evidence of their actual intent, and the court will interpret, rather than reform, the contract following ordinary canons of contract interpretation and applying ordinary standards of proof.

### Do you have any advice for avoiding drafting errors in the first place?

Given the difficulty in reforming written contracts, it is vital to ensure that important contracts are mistake-free. Most drafting errors can be avoided by following these three tips: First, be cautious when creating a new contract from an old template. Sometimes stock language conflicts with a term agreed to by the parties.

Second, always have someone review the final draft, such as an outside counsel or businessperson, especially one who was involved in negotiating the deal or whose area of business is impacted by it.

Third, beware of grammar. Several headline-grabbing contract disasters involve something as simple as a misplaced comma. Most people do not know how to use commas properly, so keep sentence structure simple, and avoiding modifying clauses as much as possible. ●