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# LEGALLY SPEAKING

## Red herrings and the art of legal distraction

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It's August in Minnesota. The sun is shining, the lakes are full, and fishing season is in full swing. From the Boundary Waters to Mille Lacs to Crystal Lake, the docks are busy, the coolers packed, and anglers are chasing that elusive trophy fish before fall settles in. But while everyone else is talking about fishing stories, those of us in the legal field often find ourselves chasing a different kind of catch — one that we don't want to reel in.

The red herring.

Unlike the prized bass or walleye, red herrings are the fish you don't want. But much like a wayward hook, they find their way into our legal arguments, depositions, negotiations, and hearings, frequently veering a case off course. If we're not careful, they'll muddy even the most carefully planned strategy.

### The scent of distraction

The term "red herring" comes from an old British hunting practice. Trainers would drag a pungent, smoked fish across a trail to test their hounds' ability to stay focused on the real quarry. In the legal world, a red herring does the same thing — it diverts attention from the issues that matter. A red herring could be a fact, argument, or statement meant to distract, intentionally or not, from the core issues of a case.

We see them often:

- In depositions: "Isn't it true you once filed a complaint against another employer?"
- In court: "This plaintiff just wants a payout — she's sued people before."
- In mediation: "Let's talk about how disrespectful their emails were."

These statements may be emotionally charged or superficially relevant, but they don't move the legal needle. They won't change liability, damages, or statutory interpretation. Yet if we don't stay vigilant, they can hijack the conversation.

### Why red herrings work

Red herrings are so effective because they tap into our human need for emotion, story, and moral judgment. They give listeners — whether a judge, arbitrator, jury, or mediator — something juicy to latch onto when the real issues might be dry or complex.

They also provide a cognitive shortcut. When faced with ambiguity or



DEPOSIT PHOTOS

complexity, people often reach for what feels clear — even if it's not the right thing.

Sometimes, red herrings are deliberately introduced — a strategic maneuver to distract or inflame. Other times, they arise from emotion, frustration, or just poorly thought-out arguments. Regardless of how they appear, the result is the same: confusion, distraction, and possibly a loss of credibility.

### Recognizing the red herring

Red herrings often come wrapped in strong language and high emotion. They feel urgent, demanding a response. But on closer inspection, they don't support the legal claim, defense, or remedy at hand.

To spot one, ask yourself:

- Does this fact support or impact the claim or defense?
- Is it designed to provoke emotion, or does it advance logical reasoning?
- Would the case outcome change if this issue simply disappeared?

If the answer is "no," then you likely have a red herring on your hands.

### How to respond without taking the bait

The good news is you don't need to be led off course. In fact, your ability to calmly address a red herring and steer the conversation back to the legal heart of the matter can boost your credibility and control over the situation.

**Name it, frame it, move on:** Sometimes, the best response is to call it what it is — professionally and succinctly.

"That issue is a red herring. It doesn't address the legal standard the court must apply."

This doesn't have to be combative; instead, it's clarifying — particularly in front of a neutral party or decision-maker.

**Refocus with purpose:** Ground your response in the rule of law, bringing the conversation back to what truly matters:

"The dispositive issue here is..."

"Under the statute, what matters is..."

"Let's return to the key facts..."

This method keeps you focused and reassures everyone that you're sticking to what's important.

**Use structure as a shield:** When making written arguments, strong organization and clear headings can prevent red herrings from gaining traction. Anticipate possible distractions in your opponent's arguments and gently address them while reinforcing your own position.

"Defendant argues the plaintiff's character is in question. But this is irrelevant to the breach of contract issue."

A well-placed footnote can sometimes do more than an entire page of protest.

**Prepare clients and teams:** Clients can easily get caught up in red herrings, especially in mediation or depositions. The same is true for junior lawyers and witnesses. Give them a heads-up:

"You might hear something surprising or personal. Stay calm. It's just bait. Our job is to keep moving toward resolution."

A well-prepared client or colleague is less likely to be thrown off balance — and more likely to trust your strategy.

**Preserve your narrative:** Always structure your narrative around the relevant legal issues. When someone tries to derail the conversation with an emotional side story, it's your job to reel it back in.

You can do this gracefully:

"While that may evoke strong feelings, we're here to focus on whether the fiduciary duty was breached under the partnership agreement."

It's not about ignoring the emotions — it's about keeping them in their proper place.

**Stay on the trail:** Red herrings are often disguised with compelling language, moral tones, or even sympathetic details. But when evaluating or presenting a legal issue, you need to stay on the trail.

In trial, it means knowing your elements and burdens inside and out.

In negotiation, it means staying anchored to your BATNA and priorities.

In motion practice, it means writing with precision and resisting detours.

In conversation, it means listening carefully and responding strategically.

### A closing cast

There's something timeless about the fishing season — calm mornings by the water, the patience of waiting for that perfect catch. The best anglers know the difference between a tug and a snag. Similarly, the best lawyers know when to distinguish between a solid argument and a red herring.

So, this summer — whether in the courtroom, around a conference table, or buried in motion practice — stay sharp. Recognize the distractions. Trust your instincts. And keep your case on course.

Because in law, as in fishing, it's not about catching everything — it's about catching what counts.

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