



Highlights from Lightfoot's Second

# CLIENT ROUNDTABLE

 Lightfoot

Every other year, we bring together general counsel (GCs) from the companies we are honored to represent for the Lightfoot Client Roundtable. It's a day centered on candid dialogue, shared insight and meaningful connection.

Our most recent Client Roundtable was a tremendous success, with participants engaging in open, unfiltered conversations about their most pressing issues. The program featured presentations by Lightfoot lawyers, focusing on the complex problems GCs grapple with every day in their rapidly evolving roles. Sessions left plenty of time for unguarded group discussions, allowing our clients to share solutions and takeaways rooted in their own unique experiences that others might learn from.

Here are some highlights from those presentations.



# Mitigating Liability for Consumer Product Companies in a Complex Business Environment

In today's highly litigious environment, the plaintiffs' bar continues to test new avenues of attack, placing consumer product companies in a tight spot. They must create desirable products that consumers want to buy and promote them effectively. These products are also actively used by people in the real world in ways that a company's engineers and developers may not anticipate, with unintended consequences such as injuries and accusations of false claims. All of this means that liability is a fact of doing business for any consumer product company.

We opened this year's Client Roundtable with a strategic discussion focused on how in-house counsel can both ensure the business success of their company while proactively mitigating liability. It was a wide-ranging session covering everything from the legal responsibilities of marketing to the so-called "duty to innovate" and potential liability from new product features.

## Practical takeaways from this session:

### Legal and marketing coordination:

The plaintiffs' bar regularly uses marketing materials in litigation as evidence that companies prioritize profits over safety. It's imperative, then, that a company's legal and marketing teams are in sync to ensure ads are accurate and compliant. They must work together to balance business needs with the need to mitigate liability, particularly on issues related to safety and providing accurate product descriptions. This includes ensuring that advertising and marketing copy aligns with a product's user manual.

### Mitigating risk from controversial features:

Some of the best-selling features for a product also significantly increase risk. Companies must balance competitive realities with tools such as disclaimers and owner's manual warnings.

### Product safety and customer responsibility:

Product safety features are crucial, but customer negligence can undermine their effectiveness. This is why clear warnings and other language in user manuals and on products themselves are so important.

### Litigation preparedness:

The demands of today's litigation, coupled with increasingly skeptical juries, mean GCs and their outside litigation counsel must be as prepared as possible. Today's trial lawyers must contextualize facts, deploy technology to support key trial arguments and conduct thorough internal investigations. It's imperative that trial teams understand the mindset of today's juries and communicate effectively to win their genuine trust in a client's side of the case.

### Understanding the duty to innovate:

The duty to innovate established in the California *Gilead* case places even more pressure on drug companies. In *Gilead*, the court ruled that drug manufacturers have a duty to develop and bring beneficial medications to market, even if they are similar to existing products. As a result, drug companies are now responsible for not only what they bring to market but also what they don't. It's a Catch-22 situation that will open up a new area of legal liability.

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# Diffusing the Bomb: Nuclear Verdicts Strategy

As highlighted in our first session, today's juries are slow to trust and quick to judge any and all institutions, including large corporations. This is reflected in eye-watering nuclear verdicts from the past several years, with juries regularly awarding plaintiffs tens of millions, even hundreds of millions, of dollars in damages. The situation creates an extremely fraught courtroom environment that clients and their trial lawyers must consider when preparing a defense.

We presented on this topic during the last [Lightfoot Client Roundtable](#). This year's session revisited and expanded upon the issue, providing updates and new insights.



## Key learning points:

### **The importance of a powerful emotional defense narrative.**

Plaintiffs' counsel are usually seen as having the upper hand when presenting an emotional case that engages juror sympathies. That does not mean, however, that the defense must cede this advantage to the other side. In fact, it's even more important at a time of nuclear verdicts for defense counsel to connect emotionally with jurors. This must be done in a genuine way, as juries will react negatively to lawyers they perceive as smarmy, fake or dishonest. By telling the truth honestly and completely from a client's perspective, defense counsel can gain a jury's trust and attention. It's also important to avoid getting in the weeds with legal details. Explain the legal concepts at issue, but also give them practical context so the jury can relate.

### **Make jurors the smartest people in the room.**

Hand-in-hand with current societal distrust of institutions, there is an increasing hostility towards elitism, whether real or perceived. As a result, lawyers must ensure they do not talk down to jurors or otherwise treat them in a dismissive way. This is especially true when communicating complicated technical information. Defense counsel's role is to educate jurors without looking like they are educating jurors. Personal stories, engaging trial exhibits and rhetorical questions welcome jurors into the defense narrative, making them active participants with agency. A good trial strategy approaches the case from the point of view of everyone in the room learning as they go, including the jury, with no one made to feel like they are not smart enough to understand.

### **Don't be afraid to talk about case valuation.**

Many defense counsel shy away from talking about case valuation in front of jurors. In fact, being open and honest about possible damages with a jury builds trust. To do this properly, trial teams must prepare from the start of the case to discuss valuation – and give juries an actual number. That allows defense counsel to build the number into the trial narrative so jurors do not just hear about award figures from the plaintiffs.

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# The Mechanics of an Internal Investigation

Using the firm's work handling the impeachment investigation of a sitting state governor, this session focused on the elements of a successful internal investigation. A careful internal investigation can allow a company to prevent litigation or enforcement scrutiny by revealing potential liability and guiding corrective action to maintain credibility with stakeholders.

There is also precedent for more equitable treatment by the U.S. Department of Justice, Securities and Exchange Commission and other enforcement agencies if a company demonstrates it has taken proactive steps to root out and address any alleged illegal activity.

## Key points raised in the presentation and discussion:

### Identify the client correctly:

It is crucial that outside counsel and GCs identify the correct client for the investigation. This dictates not only the scope of an investigation but also reveals key stakeholders and addresses questions of privilege and duty of loyalty. A "client" could be the company itself, a board of directors or another entity.

### Select the right team of lawyers:

Having smart lawyers conduct an internal investigation is not enough – they must have the right experience. This process should not be rushed and must take into account all aspects of the investigation to ensure the right people are in place.

### Manage the narrative:

The investigation team is in charge of the narrative. It is responsible for setting the tone and messaging. This requires being straightforward and transparent. There are many "audiences" during an investigation – the client, the rest of the company, the government, the public, etc. – and each must hear the same consistent story.

### Ensure fairness and due process at all times:

Investigations must be fair and adhere to the strictest standards of due process in order to be an effective tool for mitigating liability and enforcement scrutiny. Ensure, for example, that employees receive proper Upjohn warnings and understand that the company's lawyers do not represent their interests.

### Address the complexities of the investigation's outcome.

Internal investigations are complex and can have lasting impacts on organizations and their teams. Even if an investigation is "successful," uncovering wrongdoing will seem like a failure to some stakeholders – and that will echo even after the investigation is over. Investigative teams must understand this reality and take steps to frame results as positive for the company (i.e., wrongdoing will cease, the company mitigates liability, etc.) while not blunting the seriousness.

## Sharing knowledge, building connections

The latest Lightfoot Client Roundtable was a powerful day spent connecting and learning. We were grateful that our clients embraced the spirit of this program and spent the day sharing information, perspectives and resources openly, listening generously and collaborating with their peers. Many in-house counsel lack opportunities to discuss their biggest stressors with peers who can understand and offer new perspectives on pressing issues.

**It was an honor to gather this group again, and we look forward to the continued opportunity to grow together.**



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