

## EVALUATING GUT INSTINCTS WISELY

by

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“My gut tells me.” We’ve all probably heard or used this phrase. It usually comes up when we do not have enough information to reach a totally fact based conclusion. So we draw a conclusion based on a mix of a limited number of facts and .... And what? What is this speaking gut?

We might follow our “gut” during a deposition. Looking to some sixth sense, we pursue an apparently tangential line of questions that reveal an unexpected vein of damning facts. At the other extreme, in the text of a heated brief, we might follow our “gut” and argue that the other party acted in bad faith in failing to provide documents he or she *must* have. We find out in the responsive papers that no such documents exist, and the denial of their existence is not only plausible, but logical. At oral argument, our gut is silent, but twisting, when the judge rules sternly in denying the motion.

We must understand this “gut” that we are relying on. Is it one thing, constant, consistent and reliable. Does it speak in different tones, volume and textures; helpful in one instance and embarrassing in another. Is it the voice of insight derived from our years of experience; or could it be a medley of voices originating, *e.g.*, in anger or the irrational demonizing of an opponent.

This inquiry leads us to some other words. Insight. Intuition. Savvy. Presumption. Arrogance. Foolishness. All of these may aptly describe the source of a gut decision we have made.

The ideas arising from the gut are going to be tested by our clients, opposing counsel or the court. We want our decisions to be substantial, and weighted in right thinking. Obviously, we do not want to move blindly, or with a fool’s arrogance. We need to reflect and look for the difference.

The gut is sometimes used like a magic wand that we hope will make our confusion disappear. It takes a great effort to step back from the gut’s exciting and energizing ideas to evaluate those ideas; to look at them and test them.

### *Gut reactions to people*

Common sense tells us that it takes time to know a person well. Experience tells us that every person is a mix of qualities and characteristics, frequently paradoxical. Yet, in an instant or at a first meeting, our gut often tells us to trust someone or not; that someone is a jerk or a nice guy; that someone is bright or foolish. There certainly may be some truth in our initial impressions or insights; but generally, it would be a limiting mistake to fix that impression into a cardinal truth. We need to balance the impulse to make our gut impressions the final word on another person, with the awareness that there are other means of understanding.

In her short story *Witness for the Prosecution*, Agatha Christie provides an instructive fictional model of impulsive judgment. The story begins with Solicitor Mayherne looking through his pince-nez glasses into the face of his client Leonard Vole. Mayherne is “by no means a fool” and his “reputation stood very high.” He was practical and not emotional. Vole, on the other hand, is staring off in a daze; his look hopeless. He has been charged with a cold, calculated, murder.

Mayherne tells Vole that utter frankness is required if Mayherne is to provide Vole with the best defense. Mayherne, however, has already assumed his new client’s guilt before Vole walked in the door.

When the dazed Vole finally responds to Mayherne, he starts quietly, then his voice builds. His first words: “You think I’m guilty .... But, by God, I’m swear I’m not!” Vole protests against the apparently inexorable conclusions arising from an unfortunate web of circumstances that only create a false picture of his guilt.

Mayherne knows that even a guilty man in this situation will claim innocence, but Mayherne begins to believe in the possibility of Vole’s actual innocence. By the end of their meeting, Mayherne speaks with an “unusual impulse” and declares his belief in Vole’s innocence. Despite the strong pattern of facts and the testimony of a key witness arrayed against Vole, Mayherne concludes: “I hope to prove [your innocence] and vindicate you completely.”

Mayherne fixes his mind against the key witness without ever having met her . He tells Vole that “She hates you. That much is clear.” In fact, Vole is the murderer and the “spiteful” witness is genuine. Mayherne’s initial judgment, reached after some preliminary questioning, is utterly wrong. His clarity about the vengeful nature of a witness he never has met is a self-imposed illusion; it simply fit his impulsive feelings about Vole.

The point is that we have to weigh the gut reaction before we act on it; and before we follow it into court. We need to judge ourselves, our ideas and our arguments before presenting them to the judge or jury for final judgment. This is not a call to hesitation, inaction or vacillation. Patient and thorough analysis is active. We should no more let an unmeasured idea lead us, than we should make an argument on a point of law without doing the research to find out if the cases actually support our reasoning.

Effectively weighing the character and depth of our gut instincts can only come after years of effort in laying the groundwork for developing our understanding. Such a process elevates the quality of our insight and the quality of our gut. Clear thinking is no simple thing, until years of effort make it simple.

The Japanese word “hara” provides perspective here. The hara is the belly. It means more, however, than just the physical stomach. A person with a hara of substance is balanced and full of life’s essential force; he or she is not driven by uncontrolled emotions arising thoughtlessly in response to surrounding events. A person with a strong hara is stable and balanced internally and in their actions. They have been freed from the whimsy of irrational

reactions shaping their lives. It is a place where a person can find the truth about themselves or another. A person with such a hara has done a lot of work in their life to achieve this state.

*We need wisdom to understand the value of the gut's reactions.*

Measuring the value of the gut's message, and raising up the quality of our insight, calls for another word: wisdom. This is the tool to measure the value of our gut instinct, and to give the gut its most useful role.

Maybe the most famous "case" known is that of the two women who claim the same baby as their own. They come to King Solomon to resolve their dispute. After hearing their claims, Solomon pronounces that the baby should be cut in half, with each woman to receive her a share of the severed child. The real mother, in her love, refuses the order and is willing to let the other woman keep the child. The false mother agrees with Solomon's solution and says to the other, "It shall be neither mine nor yours; divide it." Solomon, recognizing the compassion of the true mother, gives the baby to the woman willing to surrender the child.

This is often given as the ideal example of great insight and cleverness. It is the dream of many judges and lawyers to come up with a similar act of "Solomonic wisdom" to resolve or win a case.

Solomon's decision is where the telling usually ends. The biblical point is not complete, however, with the decision giving the baby to the woman willing to sacrifice her motherhood.

Just before the story of the two women, Solomon had made an enormous sacrifice/prayer to God. Soon after, God appears to Solomon in a dream, offering Solomon whatever he asks. Solomon responds by expressing gratitude to God for God's love of Solomon's father, David, and for placing Solomon on David's throne. Solomon also honors the greatness of his father's life by recalling David's faithfulness and his righteous nature which God had rewarded.

In his next breath, Solomon describes himself as a mere child; he does not claim to have reached David's station or to have the understanding necessary to adequately lead the people. After humbling himself, Solomon asks God to give him a "listening heart", i.e. wisdom. This is the heart of wisdom referred to in the Psalms, where the psalmist observes the shortness of life and prays, "Teach us to number our days so that we may obtain a heart of wisdom." (Psalms 90:12).

Solomon tells God that with such wisdom he could govern the people God had placed in his trust; and he could discern between good and evil. God is pleased that Solomon seeks the wisdom to discern what is right, rather than seeking long life or riches for himself; or seeking the deaths of his enemies. God promises Solomon the wisdom he requests.

It is only after this experience that the first test of Solomon's wisdom comes with the two women and the baby. When Solomon passes his final judgment on who shall receive the child, the biblical verses go on to state: "All Israel heard of the judgment that the king had rendered; and they stood in awe of the king; because they perceived that the wisdom of God was in him to

execute justice.” Solomon’s wisdom is not the result of spontaneity, mere cleverness or raw intelligence. The source is greater, and the people who see the result of his wisdom recognize its depth.

Whether or not one believes in the biblical story of Solomon, it offers a rich lesson. Real wisdom begins with humbly recognizing our own limitations; recognizing the immense magnitude of what exists beyond the bounds of our minds; and that the source and scope of wisdom are much greater than our limited imaginings, thoughts, emotions, biases and desires. Moreover, wisdom can only come after we make sincere, determined and real efforts to cultivate and receive wisdom.

### *Cardozo and wisdom*

In his great eulogy of Benjamin Nathan Cardozo, Learned Hand speaks of Cardozo’s wisdom: “like most wisdom, his ran beyond the reasons which he gave for it.” Hand asks, “what is wisdom”? His answer: “I do not know; like you, I know it when I see it, but I cannot tell of what it is composed.” There is “one ingredient,” however, that Hand thinks he does know. “[T]he wise man is the detached man.” Hand does not mean a person merely detached from their own grosser interests, such as their personal financial gain. He believes most judges could achieve that level of detachment. He is “thinking of something far more subtly interfused.”

A person’s “convictions,” “outlook,” “the whole make-up of our thinking” are things that “we cannot help bringing to the decision of every question ...” Such things make us “creature[s] of our past.” Moreover, “woven” into our past are “all sorts of frustrated ambitions with their envies, and hopes of preferment with their corruptions, which long since forgotten, still determine our conclusions.” The “wise” person is one “exempt from the handicap of such a past; he is a runner stripped for the race.” The wise person can “weigh the conflicting factors of his problem without always finding himself on one scale or the other.”

Hand saw Cardozo as such a person. Hand observed some of the qualities associated with opening the door to such wisdom. Cardozo was self-effacing. He was not enraptured by the passion for publicity. He was “serene ... gracious to high and low.” His spirit was not violent. It did not include such qualities as hatred, envy, jealousy and ill-will. He was not acquisitive; nor did he “use himself as a measure of value.” Cardozo could “get outside of himself and look back.” Hand believed that Cardozo’s self-effacement was a source of true power. In Hand’s eyes, this “purity” in Cardozo exceeded the value of his “learning ... acuteness ... and ... fabulous industry.”

For Hand, wisdom is the result of self-effacement, symbolized by the runner stripped for the race. This self-effacement does not mean that we disappear or that we are eradicated totally. We have reached a different form that is better capable of running the race. We have removed the extra weight and excess of our prejudices, biases, envies, resentments and frustrations; we are now lean and sinewy, toned and ready to run strong and fast.

These sorts of metaphors are limited by half. They leave out the way in which wisdom can grow through addition. This positive work goes hand in hand with the clarity that comes

with setting aside, removing or transforming our deleterious traits and qualities. The runner did not develop his or her fitness to run the race only by disarding; he or she also added muscle and stamina by daily effort and exercise.

In his book, *Law and Literature*, Cardozo includes his 1925 commencement speech at Albany Law School, “The Game of Law.” This is not a game to be played by rules that reward only the most skilled: “like every game worth playing, [the law] exacts something more important, and that something is the sportsman’s spirit, which is only another word for character. This is the chief thing, more important far than skill, for skill without this will be palsied and perverted.”

He asks these soon-to-be-lawyers to have the courage to make the right choice when presented with “unassuming, unobtrusive” decisions, where it would be easy enough to choose a wrong that seems only “venial.” He asks them to do the right thing even though doing the wrong thing seems of little consequence, or may even make life seem a little easier.

Cardozo offers the young lawyers a lesson from William James: developing skill is the result of hard work and persistence. This hard work and persistence eventually are transformed into habit; and the fruit of this habit is “character.” Within a person of such character “the power of judging ... will have built itself up ... as a possession that will never pass away.” Here, Cardozo does not mean learning how to be a courtroom judge, but how to use judgment as a human being. This is the dawning of wisdom that can weigh what our gut says.

Later, he tells the new lawyers that they will have to “study the wisdom of the past, for in a wilderness of conflicting counsels, a trail has there been blazed.” They will study the “life of mankind, for this is the life you must order, and to order with wisdom, must know.” They will finally “study the precepts of justice, for these are the truths that through you shall come to their hour of triumph.”

### *Actions associated with wisdom*

With Solomon, Cardozo or Hand, wisdom begins with humility; that there is a measure greater than our own ego. This is not false humility, weakness or cowardice. It does not mean backing down from bullies or vacillating in our positions for the sake of pleasing others. It does not mean substituting someone else’s lack of clarity for our lack of clarity. It means recognizing the fact that we do not know everything, that there are truths beyond our limited thoughts, biases and experiences; and that we can always be learning more and deepening our understanding. It means escaping from the trap of defining the world within the bars of our own minds and desires; and recognizing and pursuing something greater as the measure of understanding. It also means that we can keep making mistakes without being discouraged.

We can work to eliminate the qualities that shrink our vision. The qualities we practice as human beings will have a direct effect on our understanding. We might experience impatience, frustration, anger, envy or jealousy, but we do not have to act on those qualities. Sometimes this is as simple as putting an angry letter in our top drawer to read the next day, instead of mailing it immediately. Sometimes the restraint required from following an impulse is

much greater, but taking the consequences in perspective might be of some help. Like the single spark starting a fire that burns down a skyscraper, one angry or hasty act can undermine the value of hours, days and months of hard work. Finally, after we stop feeding our destructive qualities for a sufficient time, they may even leave us alone.

While turning from negative qualities, we can anchor ourselves in ennobling qualities. This builds the scope and depth of our wisdom, and progressively makes it easier to put our negative qualities in perspective and under our control. For example, as part of legal practice, it allows us to be on top of our cases, instead of our cases being on top of us.

Determination. This includes gathering facts, thinking on their meaning and continuing to probe for more. It calls for analysis, and not stopping with convenient ideas, or those conclusions that are merely pleasing to us. More importantly, it calls for a determination in looking equally at ourselves, before weighing our gut instincts about others. This self-examination is the road to genuine progress; without developing the depths of our own self-understanding, our efforts will be like digging with a spoon instead of a shovel.

We may not make a thousand burnt offerings like Solomon, but the equivalent “sacrifice” is needed if we are going to be the ones who understand the value of what the gut says.

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