

Replacing the Mediator Orientation Grids, Again: The New New Grid System

BY LEONARD I. RISKIN

This is my last article about mediation grids. I hope.

In 1994, in these pages, I proposed a system for understanding mediators' orientations that was based on two continuums. See "Mediator Orientations, Strategies and Techniques," 12 *Alternatives* 111 (September 1994). One continuum focuses on the mediator's customary approach to problem-definition. It runs from "narrow" to "broad," as depicted in Figure 1 below.

The other continuum, which represents the mediator's notion of the mediator's role, is anchored by "facilitative" and "evaluative." Crossing the two continuums produced the four quadrants that appear in Figure 2, below, each of which, I wrote, represents an "orientation" commonly employed by a segment of mediators.

This grid became the most common method for categorizing approaches to mediation. [*Editor's note: A full-length law review examination treatment of the author's grid—"Understanding Mediators' Orientations, Strategies and Techniques: A Grid*

for the Perplexed," 1 *Harvard Negotiation Law Review* 7 (1996)—received an award from *Alternatives'* publisher, the CPR Institute.] The grid formed the basis for many training programs. It also provided a starting point for academic debates about the nature of mediation.

In 2003, however, this author revisited the grid and published in these pages a critique and a proposal for a new system. "Retiring and Replacing the Grid of Mediator Orientations," 21 *Alternatives* 69 (April

2003). This *Alternatives* article is adapted from the *Notre Dame Law Review* article.

PROBLEMS WITH THE OLD GRID

Although the problem-definition continuum still works well, the role-of-the-mediator continuum does not, for several reasons, the most important of which is that evaluating and facilitating are not really opposites, any more than playing football and kicking a football are opposites. Besides, most mediators use techniques that fall into both these categories. For those reasons, I proffer a "New Old Grid," which is just like the "Old Grid" except that it replaces "evaluative" with "directive" and "facilitative" with "elicitive." See *Id.* at 31.

But I recommended against using that grid, too, because it retains many of the problems of the old grid: It fails to distinguish between the mediator's behavior with respect to substance and procedure; it has a static quality that ignores the dynamic, interactive nature of mediation; and it is grounded on the idea of mediator orientation, an unrealistic notion that excludes attention to many other issues in mediator



2003). But the "new grid system" proposed in that article ultimately disappointed and confused me and some others who read it carefully.

And so, later that year, I prepared a more extensive critique of the old grid and proposed a "New New Grid System." See "Decisionmaking in Mediation: The New Old Grid and the New New Grid System," 79 *Notre Dame Law Review* 1 (December

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Problem-Definition Continuum

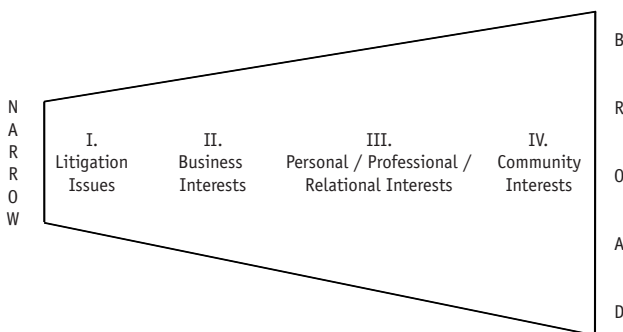


Figure 1

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The 'Old' Grid of Mediator Orientations

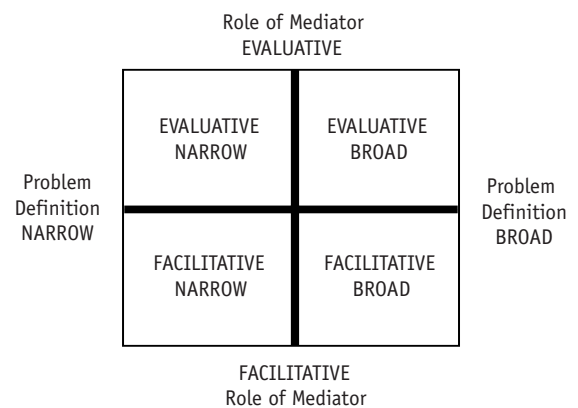


Figure 2

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behavior and ignores the role and influence of the parties.

So I present the “New New Grid System,” which I hope avoids these deficiencies.

TWO MATTERS HIGHLIGHTED

The New New Grid System is intended to facilitate good mediation decisionmaking by bringing attention to two matters: an enormous range of potential decisions in and about a mediation, and the extent to which various participants could affect these decisions. The system works through a series of grids that—rather than focusing exclusively on the mediator, as did the old grids—give equal attention to all the participants, which ordinarily means the mediator, the parties, and the lawyers. In addition, the grids take account of time and the potentially dynamic nature of decisionmaking.

The system’s central focus is on participant “influence” with respect to particular issues. It provides a method for considering the influence that participants aspire to exert, actually exert, and expect others to exert, with respect to any of a wide range of decisions. It does this by dividing mediation decisionmaking into three categories: substantive, procedural, and meta-procedural.

1. Types of Decisionmaking: *Substantive decisionmaking* includes trying to understand substantive issues, such as what happened to cause the dispute, and trying to make agreements intended to resolve the dispute. It also includes establishing the problem-definition, i.e., the subject of the mediation.

Procedural decisionmaking means deciding what procedures will be employed to reach or address the substantive issues. Here is a list of potential procedural issues, which overlap to some extent.

- Logistics: Location; Time (dates, starting and ending times, number and length of sessions).
- Pre-mediation submissions: Required or optional? Short letters, mediation briefs, litigation or other documents. Should submissions include: legal analyses, underlying interests, goals for the mediation, or obstacles to achiev-

ing these goals? Who receives the submissions: just the mediator, or all participants?

- Attendance and participation: Who attends? Roles of lawyers, clients, experts, others.
- Procedure during the mediation:
 - Opening statements—Which side goes first? Do lawyers and clients speak? What is the focus of these statements?
 - Caucus—Whether, when, why, and how to call caucuses. Who can call them? Whether to maintain confidentiality of communications?
 - Ending the mediation. Who decides?
- Expressing the agreement in writing: Whether, when, why, how, and by whom? How formal or legally binding should the document be? Who decides?
- Procedures for defining the problem(s) to be mediated (and/or deciding on the purposes of the mediation): To what extent, if any, will the problem be defined by the parties, e.g., through pre-mediation statements, pre-mediation briefs, or statements made during the mediation? The mediator, e.g., through the questions he asks the other participants? The mediation program managers, designers or sponsors, implicitly or explicitly? All the participants, through dialogue?
- Developing options: Will it happen? If so, when, how, and by whom?
- Developing and presenting proposals: By whom, when, how, where?
- Evaluation: Will/should the mediator evaluate or arrange for evaluation? If so, how, what, why, and under what conditions and standards?
- Reaching agreement: Will the mediator apply pressure on the parties or lawyers to reach a particular settlement? Settlement in general?
- The mediator’s role: Will the mediator direct or elicit as to particular procedural and substantive issues? Will the mediator be transparent or obscure about the mediator’s behavior? Will the mediator provide food?

Meta-procedural decisionmaking means deciding how subsequent procedural decisions will be made. The participants could make agreements, for instance, about who or what would determine any of a range of procedural issues, such as those mentioned above.

A series of grids appears on the follow-

ing pages. Each grid deals with a particular kind of decision and provides an example of an array of grids we could prepare that would shed light on particular aspects of decisionmaking in mediation. The concept that unifies the system is participant “influence”—the degree of influence that various participants either aspire to exert or actually exert with respect to a particular issue.

On each of these grids, that concept is depicted on the north-south continuum. The north end of that continuum shows that most of the influence comes from the mediator; the south end shows parties and lawyers exerting most of the influence. The east-west axis would depict a particular issue. Thus, the purpose of each grid in this series is to bring attention to the influence that each participant exerts (or would like to exert) with respect to a particular issue. A generic version of this grid appears in Figure 3 at right, at the top of page 129.

ILLUMINATING DECISIONMAKING

Here are some examples of how grids could illuminate each of the three kinds of decisionmaking.

Substantive Decisionmaking Grids: Grids of substantive decisionmaking could deal with establishing the problem-definition or with understanding or resolving particular substantive issues. In addressing each of these focuses, I propose two kinds of grids: one deals with participants’ predispositions as to how that issue should be resolved and who should contribute to its resolution, and the second focuses on actual influence.

The first grid depicts the participants’ beliefs, attitudes or aspirations about a particular issue before the mediation or before the issue arises. Figure 4, at right, for example, shows participant predispositions with respect to the substantive issue of problem-definition and their assumptions about the degree of influence they would, or would like to, exert with respect to this issue.

Point M shows that the mediator is predisposed to a narrow problem-definition and assumes that he or she would heavily influence the development of such a problem-definition. Point PA shows that party A is predisposed toward a narrow problem and definition and believes (or assumes) that he would exercise much influence in establish-

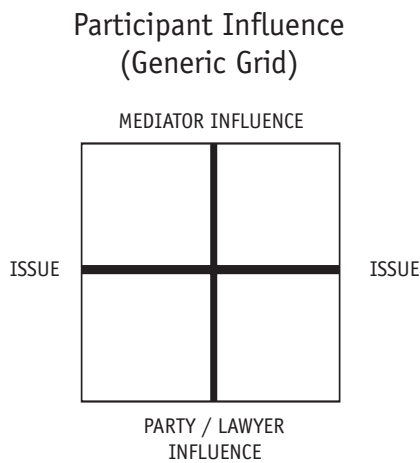


Figure 3
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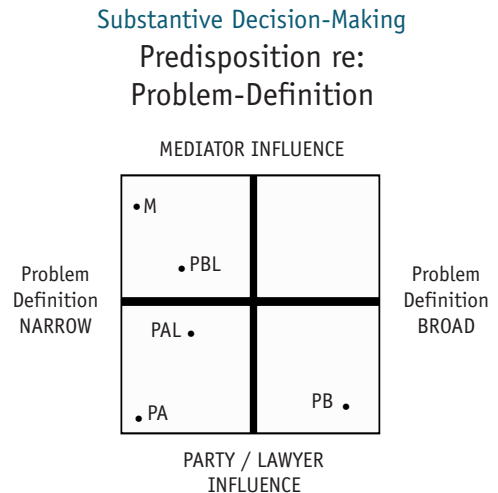


Figure 4
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ing that problem-definition.

Point PAL shows that party A's lawyer was predisposed toward a slightly broader problem-definition and assumed that his influence, combined with that of the mediator, would move the process toward it. PB shows that party B was predisposed to a broader definition of the problem and assumed that the parties or lawyers would exercise much influence or control over the process of reaching that problem definition. PBL means that party B's lawyer was predisposed toward a problem-definition of the same breadth as was party A's lawyer and expected the mediator to play the strongest role in setting that definition.

The second kind of substantive deci-

sionmaking grid would focus on actual influence. For instance, grids could show the operative problem-definition at various times during a mediation and the influences of the participants in setting that problem-definition, as illustrated in Figure 5, below left.

At T1, the mediation focuses on a narrow problem, and nearly all of the influence to develop that problem focus has come from the mediator. At T2, the mediation has a broader scope, and although the mediator's influence in developing that problem-definition still predominates, the parties and lawyers also have exercised some influence. At T3, the parties and lawyers have more substantially influenced

the development of a broader problem-definition.

Alternatively, we could use separate grids to show the problem-definition at various times. By using individual grids to depict particular moments in a mediation, and considering each as a frame in a motion picture, it would be possible to get a sense of the flow of a mediation with respect to individual issues.

Additional grids could bring attention to understanding and resolving particular substantive issues that fall within the problem-definition. On Figure 6, for instance, point A shows the parties or lawyers mainly influenc-

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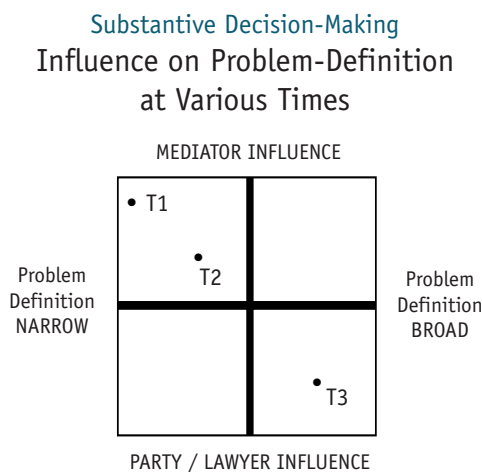


Figure 5
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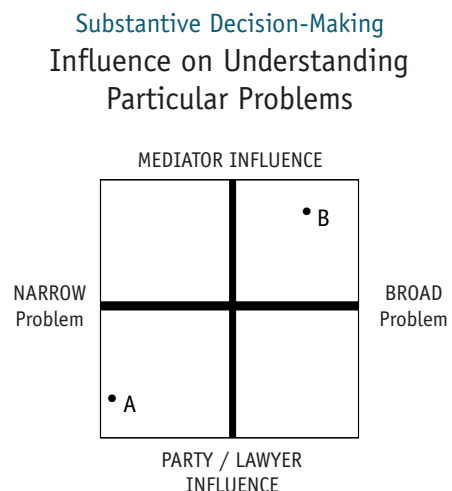


Figure 6
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ing the development of understanding about a particular narrow problem, such as how much X will pay Y. Point B shows the mediator influencing the understanding of a broad problem, such as a breakdown in professional and personal relationships between X and Y. A similar figure could show influence in resolving these issues.

Procedural Decisionmaking Grids: Procedural decisionmaking includes choices about a variety of issues made before or, sometimes moment-to-moment, during a mediation. The decisionmaking influence can come from mediators, parties, and participating lawyers. Sometimes, program administrators or designers make such procedural decisions. Some of these decisions are explicit and carefully determined—part of a formal dispute resolution design process.

In some situations, mediators themselves direct the outcome of certain procedural decisions, either before the mediation or at its inception or during the process; in terms of the “New New Grid” System, we would say that the mediator exercised virtually all the influence over such decisions. In other situations, the mediator might elicit the parties’ perspectives and desires, and make a decision that responds either fully or partially to such party desires or perspectives. The new grids would show that both the mediator and the parties exercised some influence over this decision. Sometimes, the parties assert themselves

even if the mediator does not “elicit,” and the new grids depict the influence associated with such assertions.

Procedural decisionmaking grids could address any of a range of procedural issues, such as those listed above. Figure 7, below left, for example, shows the influence of the parties/lawyers and the mediator as to whether the mediator would provide an evaluation. Another version of that grid could show predispositions around that issue.

A grid that addresses decisionmaking about the use of private caucuses appears in Figure 8, at the bottom right.

Meta-Procedural Decisionmaking Grids: Meta-procedural decisionmaking refers to deciding how subsequent procedural decisions will be made. One major issue in meta-procedural decisionmaking is what degree of influence various participants will have over specific procedural issues or over procedural issues in general. On Figure 9, on page 131, the east-west continuum shows participant influence over procedural choices, with party/lawyer influence depicted at the west end and mediator influence depicted at the east end. The north-south continuum depicts participant influence over the meta-procedural decision about how much influence participants will have over subsequent procedural decisions.

Point A shows that the parties/lawyers exercised more influence during the meta-procedural decisionmaking, and that this produced the decision that subsequently the mediator would exercise most of the in-

fluence over procedural issues. Point B shows the mediator exerting almost all the influence in meta-procedural decisionmaking, which determined that the parties or lawyers would exert most of the influence over subsequent procedural choices. Point C shows that in the meta-procedural decisionmaking, the mediator exerted slightly more influence than the parties/lawyers, and that this produced an agreement that the parties or lawyers and mediator would have equal influence in deciding subsequent procedural issues. And finally, point D shows that a meta-process dominated by the parties/lawyers also produced the outcome that the parties/lawyers and mediator would have equal influence in making procedural choices.

Similar meta-process grids could deal with the extent to which various participants would influence decisions about individual procedural issues, such as the use of private caucuses or mediation briefs, mediator evaluation, or the location of the mediation; or the degrees of influence participants would exercise over when procedural choices would be made.

THE ‘NEW NEW GRID SYSTEM’ IN PERSPECTIVE

These grids are examples only. The system allows for the development of other grids for specialized purposes. Thus, some may find it useful to produce problem-definition grids that focus on the depth of the

Procedural Decision-Making
Influence on Evaluation by Mediator

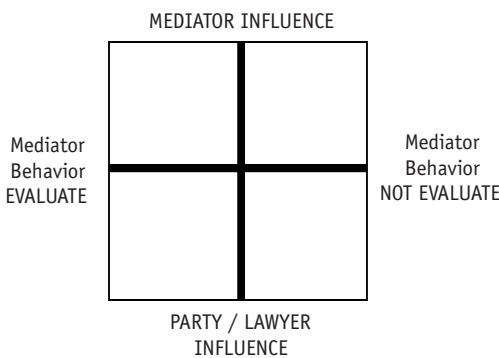


Figure 7

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Procedural Decision-Making
Influence on Use of Caucus

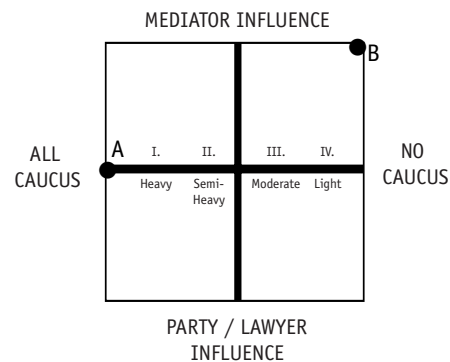


Figure 8

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problem, rather than on the breadth; the extent to which the mediation would focus on various dimensions of the conflict, such as cognitive, emotional and behavioral; and the extent to which the process would focus on settling the dispute, resolving the dispute, or transforming the parties. Other procedural decisionmaking grids could address the issue of how and when—as opposed to whether—the mediator would evaluate, or on questions regarding the rules under which caucuses would be conducted.

A series of specifically focused grids, such as these, could help foster a high degree of awareness—among mediators, parties, lawyers, program designers, administrators, and evaluators—of the many possible issues for decision and the various degrees to which participants could contribute to understanding or resolving such issues. This awareness would support more active and sophisticated decisionmaking in and about mediation. Such grids also could be useful in evaluating, studying, or reflecting on completed mediations.

The new grid system divides mediation decisionmaking into three categories—substantive, procedural, and meta-procedural—because I believe that breakdown is useful, and I believe that others also will find it useful. In other words, this system is based on a series of constructs and does not in any sense represent a truth about how the mediation process works or should work. And in some mediations, it will be difficult or impossible to identify actual perspectives or real events that correspond to some of the constructs in the system.

Take meta-procedural decisionmaking, for example. Formal meta-procedural decisionmaking appears in a range of mediations, especially those involving numerous parties and issues of public import. But in many mediations, there is no explicit meta-procedural decisionmaking—that is, no formal decisionmaking about how to make procedural decisions. It is common, for example, for the mediator or an organization that sponsors or manages a mediation program to simply announce certain procedural decisions—i.e., exercise all the influence.

Thus, for instance, when the U.S. Postal Service launched the Redress program, under which thousands of employment disputes have since been mediated, responsible officials decided that the mediations would follow a “facilitative approach.” After about a year, they enlarged the program and determined that the mediations would follow the “transformative” approach elaborated by Bush and Folger. Joseph P. Folger & Robert A. Baruch Bush, “Transformative Mediation and Third-Party Intervention: Ten Hallmarks of a Transformative Approach to Practice,” 13 *Mediation Quarterly* 263 (1996).

Sometimes, on the other hand, program designers, sponsors, or managers make important decisions unknowingly, implicitly or indirectly. Most state farm credit mediation programs funded by the U.S. Department of Agriculture in the 1980s, for example, provided mediations that were narrow and brief. This happened mainly because most state programs made very little money available to support mediators.

As a result, the only mediators who could “afford” to make bids low enough to win contracts to mediate were those who were inclined to conduct mediations quickly, which they believed required a narrow problem-definition.

Similarly, it often will be impossible to know the actual predispositions of individual participants as to particular issues; the participants themselves may have no such predispositions or be unaware of them. Likewise, we frequently will be unable to know the extent to which individual partici-

pants actually influence understanding or resolution of particular issues. And even if we could learn about actual influences exerted by individual parties or lawyers, the grids are not well suited to display them.

These limitations don’t reduce the utility of the “New New Grid” System. Its principal purpose is to shed light on what could or did happen in a mediation, and so to facilitate—to make more likely—wise decisionmaking. In other words, the system invites attention to what is and what could be, in order to facilitate decisionmaking about what should be. Thus, for instance, the grid system points out that, implicitly or explicitly, procedural and meta-procedural decisions get made, and that it is possible to make such decision processes open and to allow all participants to exercise influence in them. And the system promotes awareness of the possibility—or likelihood—of differing perspectives among participants, even between clients and their lawyers.

In this article, I do not mean to promote a particular approach to decisionmaking in general or in a given mediation. There is often much to be gained—in terms of self-determination and the quality of process and outcome—from establishing an explicit decisionmaking process that offers the opportunity for all, or most, participants to influence important substantive, procedural and meta-procedural issues. And I hope that this article encourages such processes by enhancing awareness of decisionmaking options.

But many mediations that lack explicit decisionmaking about procedural and meta-procedural issues work fine. A choice to make procedural and meta-procedural decisionmaking more open and inclusive carries costs in terms of time, energy and financial expenditures. It also presents risks of undermining the efficiency and focus of a mediation and the ability of a mediator to act quickly. So resolving the issue of openness in decisionmaking requires a delicate balance.

I do not seek to make that balance, only to mention it.

THE NEW SYSTEM’S LIMITS

The “New New Grid” System, though far more refined than its predecessors, has several limitations.

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Meta-Procedural Decision-Making: Deciding Who Influence Procedural Issues

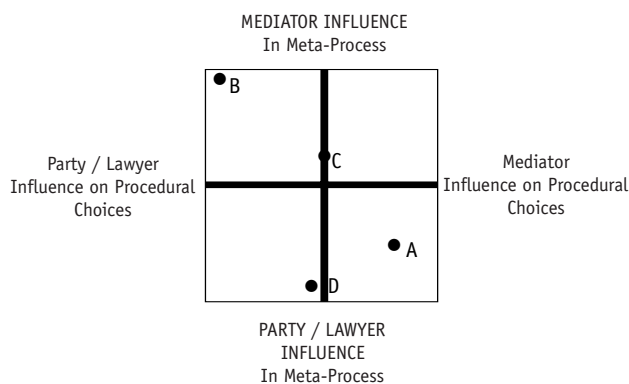


Figure 9

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First, the grids in the new system, like their precursors, are not mathematically precise in any sense.

Second, as mentioned above, it often will be impossible to know or depict the predisposition or influence of a participant with any degree of certainty. Sometimes, these attitudes or practices will rest on what the participant assumes other participants want or expect, and the outcomes will result from interactions between and among influences that are too complex and subtle to map, even if we could be aware of them. Think, for instance, about a mediator who tries to “successively reframe” the conflict, and parties who may or may not buy into such definition in varying degrees. Sometimes, too, there will be a vast gulf between a participant’s intention, and the actual effect of her or his behaviors.

I have considered, and abandoned, a number of ideas and submissions about depicting the influence of individual participants or the dynamic nature of such influences. These have involved overlaying transparencies, each displaying the influence of a particular participant; using different symbols or colors to denote different participants; adding dimensions; and changing shapes. Each of these ideas has merit, yet each seems to rob the system of the simplicity that I find so valuable. Most important, the weaknesses in the new grid system do not impair its primary function—to enhance understanding, facilitate clear conversations, improve decisionmaking, and bring attention to the subtle relationships among our intentions, our actions, and the effects of these actions.

I hope that the new grid system—the concepts and terminology—will produce similar benefits for participants in real mediations, enabling them to have a more mindful, moment-to-moment awareness that will lead to better decisionmaking. 🏠

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