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## **Governance**

No matter your mission, timeframe, giving vehicle, or other factors, choosing your first board is the most important decision you will make as a philanthropist concerned about donor intent. The people you select to shepherd your giving—particularly after your death—will make or break your donor intent. Your original board members will most likely work directly with you, learning not only what you want to accomplish, but also why and how. They will evaluate and name future trustees. Choose the right people, and you'll be well-positioned to see your mission properly executed. Choose the wrong people, and nothing will safeguard your intentions.

“If you’ve got the wrong people, no structure, no mission statement can hold them to donor intent,” says Kim Dennis of the Searle Freedom Trust. “You can put things in writing very clearly,” echoes Donn Weinberg, “but if you pick the wrong people, and they are motivated by their own ideologies and proclivities, then they’ll start to change the meaning of words. If the early trustees are not honoring donor intent, the later ones will never do it.”

Selecting the initial members for your board is tricky business and requires far more due diligence than picking your lawyer, golf buddy, or son-in-law. Donors often choose board members based on shared business activities or bloodlines, but both of those approaches, in isolation, can lead to disaster. Shared experience and family ties have their place in your decision. But neither should be your primary consideration. An “expert” with no interest in preserving donor intent might well convince other board members to take a direction in, say, education reform that is completely counter to your wishes. And family members often do the same. “You need to bring trustees on because their *philosophical* DNA matches yours, not necessarily their blood DNA,” cautions Steve Moore of the Murdock Trust.

Because it will set the culture of your philanthropy for years to come, your first board must comprise people who truly understand that they are stewards of your mission. As Robert Bork noted in 1992, fidelity to donor intent in foundations demands “self-discipline in the service of the founder’s, rather than one’s own, moral purpose.”

### **Cultivating board members**

Choosing good board members takes time, and there is no shortcut. It’s a matter of discernment and cultivation—more art than science. Finding strong candidates for your board requires getting to know them. It means discussing their thinking, over a long period of time, especially their thinking about the nature of philanthropy. It means posing questions that will uncover areas of agreement—and, equally important, disagreement. Do not settle for “yes” or “no” answers. Asking tough questions now may preserve the essence of your giftmaking in later years. The good news is that once you have them in place, the right board members can actually help you improve, refine, and define your giving.

It’s advisable to put integrity, humility, and honesty high on your list of qualifications for board members. Indeed, place more emphasis on those traits than on professional qualifications. Candidates must be humble enough to subordinate their own interests and enthusiasms to the mission you set for

them. They must be disciplined enough to constantly revisit and re-engage your vision. And they must be brave enough to take managerial, fiduciary, or legal steps to protect your intent when they feel it has been compromised. Remember, most people can be taught the mechanics of board service relatively quickly. The willingness to subordinate one's own desires in the service of another is a matter of character, usually developed over a lifetime.

Lawson Bader advises givers to find people they trust in their own generation—and, crucially, in a younger generation. “If you can actually bring people in at multiple generational levels, all of whom know you personally,” he says, that will set up your board for long-term respect for donor intent.



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And work directly and intensively with your first generation of trustees. They will benefit from working with you during your lifetime, learning your giving preferences, and precisely how you put your mission into action. And the give-and-take of grantmaking will help you ascertain that they are a strong fit as successor trustees. As Carl Helstrom, vice president for programs at the Lynde and Harry Bradley Foundation, puts it, “The best donor-intent stories are those where the donor was deeply involved in crafting not just the idea with trustees, but the actual grantmaking portfolio.”

Dr. Phillips Charities and Dr. Phillips Inc. have granted close to \$200 million to various community causes in Florida's Orange and Osceola counties, and nationally in support of free-enterprise advocates and property rights across the U.S. The original wealth creator, Dr. Philip Phillips, made his fortune in the first half of the twentieth century as one of the largest citrus growers in central Florida, then established a foundation to “help others help themselves.” The first president, Jim Hinson, was a trusted business associate who worked directly with Phillips and his son Howard from 1957 onward. “When he enrolled new board members, Hinson really drilled down to some of their philosophies to determine if they had some ulterior motives, and to make sure they understood what the Dr. Phillips family donor intent was. Only after he had that buy-in was he comfortable bringing somebody on the board,” says current president Kenneth Robinson.

As we've discussed, honoring donor intent doesn't mean that a board can't respond to new situations or opportunities. Adjustments are often necessary, and one enormous benefit of populating the first board with people whom the donor trusted, and who struggled alongside the donor to shape the foundation's grantmaking strategy, is that these shifts are made more intelligently and faithfully. Trustees intimately familiar with how the donor approached problems and analyzed potential solutions will be better able to navigate unexpected challenges and opportunities.

The founder of the Denver-based Daniels Fund did not include veterans' causes in his mission, but he was a veteran himself and admired the contributions of our armed services in preserving the nation's freedoms. "Over the years," explains Daniels Fund president Linda Childears, "we've had many opportunities to fund veterans' causes, and we as board members have looked at each other and said, 'We know Bill would love this.'" So the trustees eventually chose to help veterans within the context the donor had given them. They funded veteran-focused relief in areas that Daniels had favored: helping homeless, disadvantaged, and substance-abusing populations.

Board members need to become experts on their original donor. "You have to be a student of the donor," the president of Atlantic Philanthropies, Christopher Oechsli, told *Philanthropy* magazine in 2014. "The donor's intent consists of a range of elements: What motivated him, why did he want to give, what are the approaches, what are the values."

### **Considering a tiered structure for your board**

Donor-intent concerns should be at the forefront of your decisionmaking in naming a board. But donor intent is not the only factor in the equation. Your board will also need competence in specific duties like understanding charitable problems and solutions, managing investments, complying with laws and codes, and overseeing professional staff. Having on your board some experts in certain fields such as medicine, public policy, or education reform could be helpful. But will such expert board members honor your intent?

Some donors have approached this issue by structuring their foundations with multi-tiered boards, with separate responsibilities assigned to each tier. The Searle Freedom Trust in Washington, D.C., has three distinct tiers that make up its board of directors. The first tier of trustees is responsible for stewarding the foundation's funds, including investment decisions. According to Dennis, this division of labor has proved invaluable because

it allows the other two tiers of the board to focus on what they do best—giving money away in line with Searle’s donor intent—without becoming distracted by the investment side of the equation.

Searle’s second board tier consists of four grant advisers, chosen by Dan Searle himself, who are experts in the public-policy world and well versed in the subject areas of the foundation’s grantmaking. These advisers are primarily public intellectuals with academic, policy, and think-tank management experience. They share Searle’s general philosophical outlook—a commitment to individual freedom, economic liberty, personal responsibility, and traditional American values—and each worked closely with Searle during his lifetime. “They really know the ins and outs of the organizations we’re funding,” notes Dennis. These grant advisers, with the assistance of the professional staff, make the actual decisions about where and how the foundation will direct its funding.



Board members must be humble and honest enough to subordinate their own enthusiasms to the mission you set for them.

The third tier of advisers consists of direct descendants of Daniel Searle. They are required to meet at least once annually with the grant advisers to review grants, and they have the power, on a unanimous basis, to overturn the decisions of the grant advisers. “Their role really comes into play when they insinuate something about Dan’s intent,” explains Dennis. “Sometimes, we’ll be going back and forth over a grant decision and debating whether it’s a good idea, whether it will be effective, and one of the family advisers will say flatly, ‘Dan just wouldn’t have supported this.’ The family members are really helpful in that way.”

None of these tiers has absolute control over the affairs of the foundation. This is the strength of the tiered approach—it separates board powers and responsibilities and delegates them to those best suited to perform them. To work well, however, this option still demands that you have the right people in place, and that they are, as Dennis notes, “committed to staying in their lanes.”

Other founders have established tiered structures to safeguard donor intent. The John Templeton Foundation, for instance, is governed by both

members and a board. The members—who include family representatives, Templeton Prize winners, and others—elect the board, where one-fourth of the trustees must be drawn from the Templeton family. Similarly, at the Earhart Foundation (which sunsetted in 2015) governance was divided between an all-family group of members and a non-family board of trustees. The former elected the latter, and that was their only role. You might also consider creating a tier of trusted “members” who alone are authorized to amend by-laws or approve board compensation. In considering any such changes to standard corporate structure, you should first consult your philanthropic attorneys.

Creating a tiered structure is no guarantee that your donor intent will be honored, or that “members” and “trustees” will automatically conform. It may even create resentment and power struggles. The tiered board structure is a complement to your other donor-intent safeguards, not a replacement for them. Whether you should follow this course of action is contingent, in part, on your foundation’s size, mission, areas of giving, timeframe, and level of family involvement.

### **Compensating your board members**

Compensating your board has positives and negatives. On the plus side, it can establish a working relationship with your trustees, with clear expectations that they will fulfill their responsibilities. The Peters Foundation, for example, chooses to pay its non-family trustees. While some of those board members refuse the compensation, Dan Peters believes that as a result of the offer, “they take their job seriously—we expect answers, and they give them.” On the other side of the coin, boards who oversee foundations in perpetuity might become accustomed to the paycheck and “go along” with poor decisions just to ensure that it continues. That’s why the Jaquelin Hume Foundation has purposefully decided not to pay its trustees for service. “Once you get somebody on the payroll, they want that money to continue. We pay their travel fees, but they don’t get a salary,” says the foundation’s president, Jerry Hume.

You should understand that compensated board service (beyond reimbursement for expenses incurred) is a departure from the non-profit tradition of volunteerism. Board members at grant-receiving public charities are generally expected to serve without compensation and to provide some level of financial support to the nonprofit organization. As William Schambra noted in *Philanthropy* in 2008, “Voluntary service... is regarded as an essential expression of human devotion to purposes

beyond self-interest and a moral obligation of American citizenship.” In fact, many foundations have adopted the policy of declining grant requests from public charities that compensate board members.

Critics of compensation argue that payments to trustees, which may legally be counted toward a foundation’s mandatory annual payout, reduce the monies available for charitable grants. Foundation leaders also dispute the notion that compensation is necessary to recruit high-caliber board members or to make those board members more effective. Others suggest providing trustees with a limited amount of discretionary grantmaking as an alternative to direct payments. There is simply no one “right” answer to the question of board compensation and donors should identify the practice that best suits their needs.

With regard to donor intent, there are several powerful arguments for compensating your board:

- Whether they accept payment of \$1 or \$100,000, compensation clearly communicates to board members that they are working for the foundation and should uphold its mission, not pursue their own altruistic interests.
- Compensation widens the pool of available board members. If you want specialized expertise on your board, you may have to offer some form of payment in order to secure the service of people who will otherwise be unable to take part. Perhaps you want to include schoolteachers, or employees of religious charities, or creative workers with modest incomes on your board. They may be unable to spare the time as volunteers. Alternatively, compensation might be necessary to nab specialists like biomedical experts who are in short supply.

If you choose to compensate board members, keep several factors in mind. Paying your board members removes volunteer immunity. The federal Volunteer Protection Act of 1997 (as well as similar statutes in many states) provides broad—though not total—immunity from tort claims that might be filed against unpaid volunteers of nonprofit organizations. That can be viewed as a problem. At the same time, Harvey Dale, professor of philanthropy and law at New York University, has suggested that dropping this protection by paying compensation is “likely to increase the attention directors pay to fulfilling their fiduciary duties.” (In any case, your foundation should purchase directors’ and officers’ liability

insurance, often called “D&O,” to provide indemnification for losses or defense costs suffered as a result of a legal action.)

Remember that to avoid running afoul of IRS requirements, pay must be “reasonable and necessary.” Additionally, if you have family members on your board and you choose to pay them, extra judiciousness is warranted to avoid “self-dealing.” One damning investigation by *The Boston Globe* revealed an indefensible compensation package offered by the Paul and Virginia Cabot Charitable Trust to Paul Cabot Jr. Between 1998 and 2002; Cabot was paid over \$5.1 million for his service as a trustee, even though the foundation gave only about \$2 million to charity during this period.

To guard against real abuses like that one, or more ambiguous issues, it’s wise to put in writing some sort of job description for your board members. Explain the foundation’s expectations for the work they are doing, the number of meetings they should attend, the number of hours they will spend on foundation business each week, etc. You may want to look at foundation board compensation surveys to compare your foundation with those that have a similar asset size. Your board meeting minutes should always record compensation decisions for directors and officers, including the data used to make those decisions. Finally, remember that compensation information is part of your foundation’s tax filing and is readily available to the public.

Board compensation is one means of tapping individual self-interest for the purpose of preserving your intent. Whether it makes sense in your individual case primarily hinges on the demands of board service—the time and effort it takes for meetings, site visits, proposal reviews, and service on committees, among other responsibilities. You might conclude that compensation is simply unnecessary to attract well-qualified board members. Or you might decide that you specifically want people passionate enough about your mission to donate their time. You will have to strike the balance between pure volunteerism-based board service and enlightened self-interest in deciding what’s appropriate for your unique circumstances.

### **Setting time limits on board service**

“As a general rule, it’s always easier to grow a board than to shrink it,” says Keith Whitaker. “Once people are on there, it’s very hard to dislodge them.” A workaround that avoids the potential for confrontation and damaged relationships is a term-limit policy. After a set period—say, three years—board members must transition off the board unless they are re-elected to another term. Some policies add a hard limit to the number of years a board member might serve, but you may want to leave



## Questions to ask prospective board members

You may already have several individuals in mind to serve as board members when you establish your philanthropy. Perhaps you have discussed your plans with them, outlining your interests and what you want to accomplish. They may be family members, long-time friends, or business associates with whom you've worked closely and have a relationship built on mutual trust. What you are considering now, though, is a very different undertaking, and one that may last several decades or even longer. At the heart of good governance, reminds Virginia Esposito of the National Center for Family Philanthropy, is "building the board your foundation deserves." Don't take shortcuts in assessing possible candidates.

Here are some questions that can help you assess candidates:

- What do you know about this foundation (trust, donor-advised fund, etc.)? How does our mission resonate with you?
- Have you had prior board experiences? Have you had any experience related to our mission?
- How do you see your responsibilities as a foundation board member? What role does the board play in protecting donor intent?
- How do you see the role of a living donor at the foundation?
- What personal/professional/intellectual qualities do you think will make a great board member for this foundation?
- What role do you think you would play on the board?
- How do you typically go about making decisions in a group setting?
- How do you think a trustee should go about questioning conventional wisdom or what appears to be the majority opinion?
- What has given you the most pleasure in your personal giving? How do you choose among competing interests?
- How do you see philanthropy solving the problems this foundation is trying to address? What impact do you think we can have? What challenges do you think we are facing?
- Will you be able to contribute the necessary amount of time to this endeavor?

- Do you have any concerns about joining the board?

There are certain types of board members that donors should probably avoid. The ideal board member should be neither too aggressive nor too passive. An overly aggressive board member can lead to counter-productive friction, or substitution of his or her views for the donor's preferences. A too-passive board member may not be willing to stand on principle on important questions including donor intent. Individuals who see foundation board service as an opportunity to bolster personal prestige are not likely to place the foundation's—or donor's—interest above their own. And a too-forceful personality may end up dominating the board, discouraging others from sharing their opinions, and cutting you off from valuable advice.

open the option for well-aligned board members, rich in relational and institutional knowledge about you and your giving, to serve for long periods. Even without overall caps, simple term limits offer an opportunity to make changes when necessary. Some boards choose to apply this policy only to the term of the chairman and not the individual members, and so long as there are no concerns about adherence to donor intent, this can be a healthy way of sharing the burden of leadership.

Stopping short of establishing firm term limits, there are many “creative ways to bring people into the fold without handing them the reins,” Whitaker notes. If you are seeking knowledgeable advice around particular issues or communities, or connections with other funders, structures are available that don't include governing authority. You may, for example, establish an advisory council for one of your grantmaking areas. In a family foundation you may create a junior or adjunct board for family members who wish to participate in your philanthropy but will not have a vote in decisions of the governing board. Non-voting advisers may be permitted to make grants up to a certain amount annually so long as they fall within the foundation's mission and do not violate donor intent.

### **Planning for board succession**

It's one thing to pick board members whom you trust while you're living. It's another to plan successfully for board succession after you've passed away. Donor-intent violations often occur during these moments,

when founding trustees hand their authority to the next generation. Particularly if you intend your foundation to operate in perpetuity, it is crucial to define the process of choosing successor trustees.

Board succession should unfold according to a predetermined plan, one that you have carefully considered with your original board members. The sudden loss of a key individual should not cause a crisis. The same qualities of character and commitment to donor intent that you sought in your first-generation board members, and your careful process of cultivating them, ought to be emulated in choosing future generations of the board. Discussing this process with your founding board members and committing to paper the specific qualifications for future leadership is vitally important in transmitting your intentions. Even smart founders often overlook this. “Bill Daniels said, ‘Here’s a list of buddies that you ought to call on when you need to replace directors.’ I think it would have been very helpful if he had said, ‘When you look for future directors, look for these qualities,’ instead of saying, ‘Look for these people,’” says Linda Childears.

If you establish a foundation in perpetuity or set a sunset date several decades after your death, keep in mind the importance of age diversity on your original board. If the men and women whom you appoint in your lifetime as board members are all of a similar age, they may leave the board at about the same time. Imagine what would happen if there were a sudden and complete turnover of long-time board members and the next board included no one who had worked directly with you. To prevent jeopardizing your intent, stagger the ages of your first board members and discuss with them the importance of continuing that practice.

The story of the M. J. Murdock Charitable Trust underscores the importance of getting your first board right from the start. Jack Murdock never married and had no children, yet his donor intent never veered off course. It certainly could have happened: Murdock’s will established a broad mission statement for his giving—to nurture and enrich the educational, social, and spiritual life of individuals, families, and communities. That statement was wide enough to pose interpretation challenges for future trustees. After the Murdock Charitable Trust was officially established in 1975, the first executive action of the trustees was to comb through Murdock’s checkbook to see where he gave money himself. Clearer directions drawn from that practical record, and from conversations with those who knew Murdock well, empowered trustees to fully understand what type of philanthropy was appropriately “Murdockish.” Focused on grantmaking in the Pacific Northwest and

Alaska, the Murdock Charitable Trust has to date allocated nearly a billion dollars to arts and culture, education, health and human services, and science research.

### **Establishing board policies to protect your intent**

So far, this chapter has addressed how to recruit, train, and retain strong members for your board of directors. The next step is to establish powerful operational board policies to preserve your intent and foster loyalty to your philanthropic wishes. Below are several steps you may take:

#### *Review your mission statement at board meetings*

Many foundations choose a regular time—such as once a year at annual board meetings—to read their mission statement. Instituting this sort of ritual reminds trustees of their founder’s original purpose and, through discussion, gives them a chance to evaluate how they’re measuring up in current grant decisions.

“Our founder, James Duke, required his trustees to read the entire indenture, out loud, once a year,” says Eugene Cochrane, former president of the Duke Endowment. “They do this every February at their board meeting. It takes about 45 minutes, and it’s a wonderful way for the board and senior management to hear his voice and to focus on his wishes.”

At the Daniels Fund, most of the directors have been video-recorded discussing their relationship with the founder, Bill Daniels, and how they understand his donor intent. Additionally, the fund’s bylaws require that time is set aside at each annual meeting to reflect on Daniels and his philosophy of giving, and each year a director is asked to prepare a presentation discussing Daniels’ intentions. Some foundations begin each board meeting by sharing a story, correspondence, or testimonial about a grant that is manifestly advancing the foundation’s mission.

Other foundations have legacy statements printed at the top of their meeting agenda or in the front of their board book. Or they schedule a portion of meetings to review and discuss founding documents and reflect on what was most important to the donor. Still others invite past board chairs or senior family members to discuss grantmaking history and their recollections of the founding wealth creator. For family foundations, a powerful tool to bind future generations to donor intent is an oral history—or better, a video—of the founder speaking about his or her motivation for engaging in philanthropy. Whatever model you choose, your goal is to create a pervasive culture that honors donor

intent. When staff and grantees see that your board takes seriously your philanthropic wishes, they better understand that the same is expected of them.

*Require board members to sign a statement*

Some philanthropies require board members to sign a statement of donor intent. It might be part of a broader ethics and governance training session, or it might stand on its own. For example, the Daniels Fund requires its board members to sign a Statement of Commitment and Understanding. After reviewing a detailed set of documents describing the life, values, character, and intentions of the founder, directors are asked to ratify the following:

Signing this document affirms your commitment to preserve Bill Daniels' donor intent and his personal style of conducting business (as described in this document). You agree to set aside your personal views or preferences when acting on behalf of the Daniels Fund. It is the Board's responsibility to ensure that the Daniels Fund most effectively fulfills Bill Daniels' intentions and remains true to his ideals. You also acknowledge that you have read this document and understand its importance in guiding the efforts of the Daniels Fund.

This document, Childears notes, makes clear to new board members that foundation leadership views their appointments with keen seriousness. "We vet new board members like we're giving them the keys to our house—because we are giving them the keys to Bill's house," she says.

*Create trustee apprenticeships*

You might ease in new board members by apprenticing them. The Samuel Roberts Noble Foundation in Ardmore, Oklahoma, developed a practice of naming apprentices, called "advisory directors," who attend and participate in all board meetings. Advisory directors have no vote in actions of the board but otherwise exercise all privileges, powers, rights, and duties of directors. They keep abreast of all board activities and participate in board discussions. Advisory directors serve annual terms with no limit to the number of consecutive terms they may serve. Age limits applicable to directors also apply to advisory directors. Some "apprentices" may progress to board membership. If you plan to operate your foundation in perpetuity, implementing board apprenticeships might play an important role in your succession planning.

### *Require peer review among board members*

Creating a review process to assess whether board members are actively respecting and honoring donor intent, when combined with appropriate follow-up by the board chair, can be a valuable tool for both evaluation and ongoing education. An assessment might also reveal whether each board member:

- Is knowledgeable concerning the foundation’s mission and has the necessary skills to see that it is carried out.
- Devotes enough time, thought, and resources to achieve the mission.
- Has the necessary relationships with people and organizations to advance the foundation’s mission.

As noted above, your bylaws should include provisions for term limits of board members, or a requirement that each member be re-elected at a given point. Re-election can encourage board members to reflect on their fidelity to donor intent and be more conscientious about carrying it out.



Your goal should be to create a pervasive culture that honors donor intent—board, staff, grantees all taking your philanthropic wishes seriously.

### *Establish board removal powers*

Some foundations choose to give supermajorities of their boards the power to remove an individual member. Others vest that power in a single individual, such as a family member, family adviser, or outside entity (such as a public charity with whom you work closely). As explained in more detail below, the Roe Foundation has given the Mont Pelerin Society and the Philadelphia Society—two organizations which founding benefactor Thomas Roe trusted because they shared his philosophical outlook—standing to sue the foundation’s board members if they depart from his intent. Be advised, however, that such “watchdog” entities may also take a direction that veers from your intent.

*Ensure that individual grants bolster your intent*

Your goal should be to create a culture in your foundation that instinctively honors donor intent—from your board chair through your administrative staff. One of the best ways to do this is by ensuring that your grant awards honor your intent while you are around.

- *Develop grantmaking guidelines with donor intent in mind*

Use your grantmaking guidelines as another way to communicate your intent to program officers, other staff members, and prospective grantees. Clearly articulated grantmaking guidelines remove pressure from your board members—who will likely be the frequent recipients of off-mission requests from outside parties—and enable them to decline such requests.

- *Evaluate proposed grants to ensure they align with donor intent*

At the Arthur N. Rupe Foundation, all grant evaluations written by the program officer include a section on how the grant advances the foundation’s mission. The board reviews these evaluations to ensure that the foundation’s grantmaking is in line with the founder’s intentions. The Templeton Foundation also requires that proposed grants demonstrably relate to the original purposes of the foundation as stated in its charter.

- *Give board members discretionary grants*

Some foundations, in an effort to recognize their trustees and directors for their commitment and remove the temptation of proposing pet projects or other grants that do not align with the foundation’s mission to the board, give their directors discretionary grantmaking authority over a pre-determined amount. The John M. Olin Foundation, for example, gave its directors what are sometimes called “board” or “chairman” grants, as do many other foundations. The Olin Foundation allowed each board member to make grants of up to \$25,000 (eventually the figure became \$100,000). Some foundations restrict board discretionary grants to the mission of the foundation. Others leave them open-ended. Family foundations tied to a specific place may offer such grantmaking opportunities to family trustees who no longer reside there. It may be pragmatic to create an outlet for modest discretionary grants, provided they do not distract the board from the stated philanthropic mission. As a policy intended to help secure

donor intent, however, thoughtful oversight is necessary to prevent off-mission grants from morphing into grants which directly counter donor intent.

### *Scatter reminders of donor intent around your building*

If you have a building or office devoted to your foundation, you should consider using this physical space to enshrine your donor intent. The Daniels Fund is one of the best examples of this—its headquarters in Denver is filled with memorabilia describing the life, mission, and values of Bill Daniels.

At the Connelly Foundation, artwork, pictures, and objects dot the office as visual cues to donor intent. “You can’t really look anywhere here without seeing visible reminders of the charity and values of John and Josephine Connelly,” says Tom Riley. “It’s a benefit for the staff, trustees, grantees, and anybody else who is here to make the Connells’ presence more palpable and less abstract.”



If you plan to operate your foundation in perpetuity, the ultimate question is who or what will hold staff accountable if they depart from your charitable mission.

Cheryl Taylor, president and CEO of the Foellinger Foundation in Fort Wayne, Indiana, agrees with this approach. “We have a lot of visual cues to donor intent for people coming in from the outside—and equally important, if not more so, for our board,” adding that an enormous photo of Helene and Esther Foellinger in the board room sets the tone for every meeting held there.

### **Establishing external safeguards for your intent**

Even with sound internal policies and procedures, your foundation will have very few external defenses for your donor intent heading into the future. You may have an ally in your state’s attorney general, who has the statutory authority to oversee all charitable organizations. But your attorney general may or may not intervene if a donor-intent dispute develops. And if he or she does intervene,



the process of weighing donor intent against the perceived public interest has resulted in a mixed legal and judicial record.

If you plan to operate your foundation in perpetuity, the ultimate question is who or what will hold your board members accountable if they depart from your charitable mission. Some donors have instituted external safeguards for their intent. We describe three of these below. (One caveat to keep in mind: few such safeguards have been put to a legal test. Still, there may be good reasons to create such mechanisms.)

*Give standing to outside parties*

Thomas Roe was a South Carolina businessman who used his philanthropy to help establish a movement of state-focused, free-market think tanks across the country. He began with the launch of the South Carolina Policy Council in 1986. Roe was a judicious guardian of donor intent when he established his foundation: clearly spelling out his beliefs and wishes in the founding documents, and requiring grantees to pledge to uphold the mission of the foundation in their work.

Still concerned that the worst might happen, Roe named two organizations—the Mont Pelerin Society and the Philadelphia Society—as “watchdogs” of his foundation. He granted them and their directors standing to challenge his foundation in court, in case it ran contrary to his stated donor intent at any point in the future. Roe also insisted that these two organizations, in addition to being granted standing to sue, remain substantial beneficiaries of the foundation, receiving annual grants. This second provision—giving two organizations meaningful contributions each year—makes them, in effect, quasi-beneficiaries with a special interest in the conduct of the foundation.

Roe was active in both organizations during his lifetime, and so had good reason to believe they shared his philosophical outlook. Moreover, he had faith that their members and donors would hold them accountable to their missions, so that if the Roe Foundation ever changed course, the board members of the Mont Pelerin Society and the Philadelphia Society would step in to resolve the issue.

Whether or not a judge would give either organization standing in court is an open question. Nevertheless, the publicity surrounding such an attempted lawsuit might serve as adequate deterrent to potentially wayward Roe Foundation trustees, and the inclusion of these third parties in the foundation’s bylaws is a not-so-subtle reminder to its trustees that they can be held to account by outside parties.

### *Incorporate sympathetic organizations into your board*

A second option is to specify in your bylaws or founding documents that certain organizations that share your values should be represented on your board. Under this scenario, board representatives from third-party organizations can ensure that the philanthropy is abiding by the donor's intentions as stated in the mission statement. As board members they will have governance power, and standing to bring suit, if the organization takes a direction contrary to its stated purpose. Some observers have even suggested that donors stipulate that a majority of board members be drawn from one or more charitable organizations that share the foundation's mission, to act as watchdogs of the donor's priorities.

There are, however, serious potential drawbacks to consider in giving third-party organizations influence over your grantmaking entity:

- Such organizations may themselves drift from their missions in ways you cannot anticipate. It is important to consider carefully the organizations you involve in your board, including their history and their own provisions for ensuring that they pursue their stated purpose.
- Representatives from outside organizations may cultivate financial support for their own organizations or accede to board decisions counter to donor intent to maintain such support.
- The organization may simply cease to exist. In this instance, a provision should require the foundation's board to choose another representative organization, ideally from a list you provided. In that way you can maintain the positive influence you sought when you designated that board seat.

### *Institute donor-intent audits*

The John Templeton Foundation is a prime example of a philanthropy that has instituted special procedures to reinforce donor intent. Every five years, the foundation undergoes an external audit to measure how well it is adhering to its founder's wishes. The board of trustees selects three organizations who work in focus areas identified by John Templeton. Each organization then chooses an individual from its ranks to be an auditor.

The Templeton Foundation ensures that each auditor understands the core principles and focus areas of the foundation, and what the donor intended. The auditors then review grants approved during the previous five years and determine whether they honor donor intent. Finally, the

auditors issue a report to the board of trustees, and the board reports to the members of the foundation.

While the process is more detailed than can be fully explained here, its impact is clear. President Heather Dill explains that “The real benefit of the compliance audit is not so much the process itself and all the particularities of the audit, but that we as management are always thinking about what the founder would want. Would he categorize this project as we’re categorizing it, and would our reason be convincing to an auditor? So it forces us always to think about donor intent, it forces us to read the governing documents on a regular basis, and it forces us to read a lot of books that my grandfather wrote in which he further articulated his vision.” She warns that “The audit process is not for every organization or every donor because it does mean we need certain staff members and systems to monitor all the details, but this is how my grandfather wanted it.”

### **Achieving balance with your safeguards**

All recommendations for board policies come with a caveat: your internal and external donor-intent protections shouldn’t be so severe as to stifle engagement by your board members. Trustees must have a sense of what their title suggests—that you have some faith in their judgment. Board members who do not believe their contributions are valued may not invest time on your board, or offer much effort or imagination, or feel true allegiance to your mission. Your goal should be to create policies that inspire and guide board members, more than question their integrity or abilities. As Paul Rhoads, president of the Grover Hermann Foundation, advises, “One wants to encourage future trustees, and establish an esprit de corps that develops loyalty to the foundation’s mission.”

That very loyalty suggests that you give serious consideration to one critical area of flexibility—that of foundation lifespan. If you have set up your foundation in perpetuity, you may want to give your trustees the authority to sunset it at some point in the future. As discussed in Chapter 5, the trustees of both the Avi Chai and Earhart foundations did just that rather than extend their foundations’ existence beyond the lives of board members who had known their donors personally. Board members who truly understand the importance of honoring donor intent will be loathe to risk violation in the future and will welcome the opportunity to fulfill their obligation as the stewards of your legacy.

## The special governance challenge of living donors

Personal relationships can obscure responsibilities and roles for board members—a trustee may know the living donor well from business or otherwise, but not be aware of the donor’s priorities and expectations. Living donors must take this into account when selecting board members and establishing policies and procedures for their philanthropy. It is your responsibility to articulate, on a regular basis, your preferred operating style, your goals for your philanthropy, and what strategies you prefer. The more you work closely with your board members, the better they will understand your thinking around the issues that concern you.

Regarding governance, a living donor must address these questions before selecting and convening a board:

- What is the role you wish to play in the governance of your philanthropy? Will you join the board? Chair the board? If you don’t chair the board, what sort of relationship will you maintain with the board chair?
- Will all board decisions be subject to your approval, including grant and investment decisions? Will this allow other board members to fulfill their legal and fiduciary duties? Can they participate effectively in a wide range of decisionmaking between the extremes of rubber-stamping or overriding a donor’s intentions? What do you expect your board members to bring to the table in terms of advice and decisionmaking in order to enhance and advance your donor intent?
- If you choose to share governance with your board in a structure where all votes are equal, then what precautions must you take to ensure that your donor intent is honored and not frustrated, both during your lifetime and afterwards?