

Stanford SOCIAL INNOVATION^{Review}

MacArthur Foundation Supplement
Doing Competitions the Right Way
By Rochelle Alpert & Joshua Mintz

Stanford Social Innovation Review
Winter 2019

Copyright © 2018 by Leland Stanford Jr. University
All Rights Reserved

Doing Competitions the Right Way

The legal and logistical challenges to hosting a competition are surmountable, but they require proper planning and due diligence.

BY ROCHELLE ALPERT & JOSHUA MINTZ

When the MacArthur Foundation launched the 100&Change competition, the idea was to attract a range of innovative solutions to a serious social problem. Although fairly straightforward on its surface—the winner would receive a \$100 million grant to enable real progress toward a meaningful and lasting solution to a critical problem of our time—the reality was far more complex. A successfully run competition, which minimizes risk to the sponsoring organization while meeting a variety of objectives, takes planning, a substantial investment of time and resources, as well as meticulous and detailed execution to pull off successfully.

MacArthur's decision to run such a competition assumes that reaching out to experts in a variety of disciplines can bring new approaches to seemingly intractable problems. While hardly a new concept with regard to philanthropy, competitions continue to generate substantial interest for the philanthropic community. The reasons are manifold, but they include the growing interest in innovation and disruption, the goal of highlighting and teaching issues of concern, achieving greater brand awareness—including attracting new supporters and talent—and/or multiplying the value of the sponsor's funding for the organization's area of interest.

THE DOWNSIDE

Every competition is different, but there are certain issues that every competition by a nonprofit organization needs to consider and likely address.

Notwithstanding the allure of competitions, their benefits must be weighed against the burdens they place on sponsors, entrants,

and organizers. Two initial questions to ask: Is a competition the right approach for the issue at hand, and will it attract entrants of value to your organization? If the answer is yes, subsequent planning should consider what types of entries you want to attract and how best to entice them through outreach and publicity. Some organizations may assume that they can attract quality entrants, and even reputable persons from outside to serve as judges, simply by offering a competition, but that is rarely the case. A successful competition will normally engage many applicants, but to have a handful of winners, or even a single qualified winner, entrants will likely need to spend time and resources without any compensation, which will dissuade at least some from participating. (The same can be said for external judges.)

At the outset, it's also critical to decide whether and how you are going to assess the value of the competition to your organization. Success may be defined through objective or subjective assessments, depending on your goal(s) for the competition. If your chief aim is to enhance your organization's brand or increase awareness of a particular issue, that result may depend on subjective assessment. But if your goal is to attract a new and effective solution to a problem or to increase donations for solving the problem, the success of the competition may be readily measured through an objective assessment of some type extending beyond the end of the contest. A competition might even require an objective measurement of the proposed entries before a prize is even awarded. For example, the competition could require that measurable goals be met through the entrants' solution before the prize is awarded.

Ultimately, every organization wants a competition to enhance its reputation in the

community, while investing with finite resources. That said, there are many pitfalls to avoid here: Embarking on a competition requires perseverance, creativity, and a significant investment of time and money to ensure that all foreseeable issues, including legal ones, can be addressed. Picking the right consultants for the competition's design and execution is essential, so that entries are forthcoming and are judged fairly in accord with the rules.

Nonprofits, much like businesses, need to avoid the specter of unhappy entrants claiming that an organization ran afoul of its own rules. The best way to avoid bad publicity—whether from a failed competition; disgruntled winners; or unhappy losers who sound off on social media, civil or government lawsuits, and so on—is to treat all entrants equally and apply the rules fairly. You have to think of your rules as forming a “contract” with all entrants. Address at the outset as many issues as you can imagine might arise in creating and administering the competition, and establish procedures for how any such conflicts will be resolved. Ultimately, following the rules as written constitutes your best defense against disputes or criticism.

You also need to address the particular idiosyncrasies of various awards. For example, if a trip is the prize, you must address any issues that may arise from the travel and define the expenses to be covered. Likewise, if a car is the prize, you must require entrants to be of driving age, to be licensed, to have insurance, and to pay any vehicle transfer fees.

Before you publicly announce plans for a competition, leave sufficient lead time for addressing the development of procedures for implementing the rules of the competition. At this stage, it's also worth examining both practical and policy issues associated with the competition, including:

ROCHELLE ALPERT is partner at Morgan, Lewis & Bockius, LLC.

JOSHUA MINTZ is vice president, general counsel, and secretary at the MacArthur Foundation.



- Who will be responsible for developing the rules governing entrants' interactions with your organization
- How you will make sure the rules are unambiguous and adhered to throughout the competition (including addressing any abuses that you may or may not foresee, such as any conflicts from entries by organizations, entities, or people with whom the organization has a prior existing relationship)
- Eligibility standards and confirmation of the compliance with eligibility standards of the winning entrants
- How you will announce winning entrants, and how you will celebrate or use winning entries

The MacArthur Foundation was starting from scratch. We recruited a cross-disciplinary team from across the organization led by Cecilia Conrad, managing director of the MacArthur Fellows. We tried to consider all relevant issues and were keenly aware of the reputational risks associated with this effort. We retained

Common Pool, an experienced firm that had managed a number of other competitions. We also retained a consultant to help us evaluate the program and conduct the next round more effectively. We based the process on values that were nonnegotiable: openness; transparency; attention to diversity, equity, and inclusion; and the commitment to provide benefit to all applicants.

LEGAL ISSUES

Before launching a competition, sponsors should carefully consider the range of legal issues that might arise and formulate plans to address them thoroughly. Different styles of competition and methodology will raise different issues, so experienced counsel is critical.

Nonprofits that sponsor a competition—particularly private foundations—require special consideration under the law. Some of these concerns include:

- Ensuring that the prize serves your charitable purpose
- Avoiding more than incidental private

benefit to third-party interests as part of the project that might be funded through the competition

- Avoiding the use of proceeds for lobbying or intervention in political campaigns
- Avoiding self-dealing under private foundation rules
- Avoiding excess business holdings
- Adhering to the rules regarding grants to individuals, including prizes and awards

In addition to specific rules that apply to the sponsor as a nonprofit, there are general legal issues that should be addressed, including those that vary depending on the structure of the competition. For example, is it based on chance or skill? Sweepstakes are based on chance and have one set of legal parameters, while skill-based competitions must adhere to another. (It is easy to find yourself inadvertently in the realm of chance if you do not craft your skill competition carefully.) In the United States, generally speaking, only governmental entities have the right to run chance competitions with consideration (e.g.,

lotteries), and each state has its own rules that apply to organizations, including nonprofits.

To complicate matters further, each country has its own set of governing requirements. Thus proceed with caution with an international competition. They are many obstacles to running a worldwide event, particularly when you also have to follow US nonprofit requirements. For competitions limited to entities or residents of the United States, you will need to consider the requirements in both federal and state laws.

In short, an appropriate characterization of the competition is important in determining the nature of the laws that will apply to it. For example, if results are determined by random drawing or by a public vote on the Internet, your competition may fall within federal and state legal prohibitions on lotteries, if it is determined that the competition involves chance and monetary—or in some cases nonmonetary—consideration. Consequently, to avoid being classified as a lottery, a competition that requires an investment of significant time to craft a winning entry and/or any payment of money should also avoid the element of chance to minimize legal risk.

You can avoid the consideration issue by providing for an alternative means of entry that does not require consideration. For example, if one way of entering your competition is to raise donations for the organization, you can avoid the element of consideration, if qualifying entries can also be made without raising any money. To be successful with this type of structure, you need to treat all entries the same. For example, entries that raise donations will have just as much chance to win as entries that do not. Providing extra chances to those who actually raise funds for the organization versus those who enter through an alternative means of entry will not suffice to eliminate consideration, since the two types of entrants are not treated equally.

Alternatively, you can avoid being classified as a “lottery” by eliminating any element of chance in the competition. This can be accomplished by specifically defining selection criteria and a selection process that includes competent judges who assist the selection based on the predefined criteria. If the criteria are not used to choose the winning entry, your competition could be challenged as an illegal lottery. In short, risk exists if the odds of winning depend on the number of participants, not the content of the entries, as evaluated by qualified judges. This element must be carefully assessed in the structure of the competition.

Of course, any changes made mid-competition must be done, if at all, with care, explained

carefully to all involved, and made only after considering how potential changes may disadvantage entrants. If a clarification puts certain entrants at a disadvantage or materially changes the rules midstream, some entrants may cry foul. The guiding principle should always be to treat all entrants equally.

MacArthur was careful in preparing its rules, terms, and conditions. (See rules at www.100andchange.org.) Yet we still learned valuable lessons that will inform similar future efforts. An important lesson is to secure an unbiased third party to review the rules and flag any ambiguities.

PRIVACY AND INTELLECTUAL PROPERTY

Other important elements to consider when creating a competition include privacy and intellectual property, both of which create risks for the sponsor. The importance of each of these depends, of course, on the nature of the competition.

One area fraught with potential problems is the collection, storage, and maintenance of

MacArthur’s approach to these issues embraces the foundation’s core values: Intellectual property rights should be used for the public good and distributed widely.

personal information and other data that may be obtained from entries. Understanding and adhering to applicable laws is critical. The sponsor must clearly disclose how information will be treated, shared, stored, protected, and disposed of. The differences in state laws must be considered. Generally the sponsor should seek to meet the most rigorous standards.

In addition, if the competition is open to entrants outside the United States, data collection must comply with the requirements of all relevant countries. This, in turn, may generate conflicting requirements. For example, if the award is greater than \$600, then the sponsor may need to report the award to the Internal Revenue Service, which requires the taxpayer’s identification number. But requesting this type of information from an individual outside the United States may violate the privacy requirements of other countries.

Intellectual property rights fall into multiple categories for the sponsor. The clearance and protection of the sponsor’s own intellectual

property in the competition, such as the competition’s name and content shared with entrants in the competition, must, of course, be addressed.

To the extent that the entry incorporates intellectual property of the entrant and others, such issues must be addressed in the rules, so that the sponsor is protected from any liability for misuse of the entrant’s intellectual property or that of third parties. The rules must state who will own the entries submitted and what rights the sponsor may have to the ideas contained in the entries and/or the resulting solutions. Requiring the entrant either not to use third-party content or to disclose such use and obtain consent from the third party is critical for protecting the sponsor. Likewise, ownership of the winning entry or entries must be carefully considered both according to intellectual property norms and under the rules governing the sponsoring organization’s nonprofit status.

Lastly, the sponsor needs to consider any future liability arising from implementing ideas that may appear in the entries submitted. Like movie studios that receive unsolicited scripts, the sponsor should consider specifying in the rules that entries should not include proprietary information or trade secrets, so that the sponsor limits future liability for any alleged misuse of an entry.

The MacArthur Foundation’s approach to these issues embraced the foundation’s core values: Intellectual property rights should be used for the public good and distributed widely at little or no cost. Moreover, MacArthur decided to advance the entrants’ ideas through a website dedicated to featuring the submissions, so that other organizations might support them.

If done right, competitions can be valuable tools to enhance the impact of a philanthropic organization and its entrants. Organizations wishing to embark on this journey would be well served to seek the advice of experienced consultants and legal counsel to help chart the right course. In furtherance of the MacArthur Foundation’s mission and culture, its representatives are available to discuss the lessons learned from 100&Change with other philanthropic organizations. We maintain a series of blog posts capturing some of these lessons, we are also conducting a series of webinars, and our website provides contact information for members of the 100&Change team at www.macfound.org/100&change/. ☒