

# Fraud After All

By Rick Cohen

In the Spring 2003 issue of *Responsive Philanthropy*, the article titled “Free Speech or Fraud?” found the National Committee for Responsive Philanthropy weighing in on a case that was pending before the U.S. Supreme Court. The case involved charitable telemarketing abuse that we believed clearly crossed the line.

On May 5, 2003, we were pleasantly surprised to see the Supreme Court unanimously agree, deciding that states can crack down on charitable telemarketing fraud while still protecting the First Amendment. NCRP views the outcome as a victory for philanthropic accountability and truth in fundraising—and a decision that will ultimately benefit donors, charities and the vulnerable American families they serve.

Is there a lesson in the *Madigan v. Telemarketing Associates* case the High Court just decided? You bet. Unfortunately, some of the sector’s nonprofit leaders haven’t caught on to the message.

Many national leadership organizations, dominated by large nonprofits that use for-profit telemarketers, joined the case to defend telemarketing as free speech. Knowing that their actions put them at odds with the American public, some

hired public-relations firms to spin the free-speech argument and to stress the educational and informational roles telemarketers play in addition to soliciting charitable donations over the phone from generally small contributors.

As one flack responded to the press, “Many well-known charities use telemarketing campaigns simply to identify new donors or increase awareness about an issue.”

To the surprise of many, the Court ruled against the telemarketers—in this case, a firm that was raising money for a Vietnam veterans’ group and keeping 85 percent of the take—saying that states could pursue fraud charges against telemarketers that mislead donors. But the spinmeisters kept spinning, suggesting that the Court simply declared that fraudulent representations are fraudulent. In other words, the telemarketers’ statements to two donors in Illinois that the vets would get most of the money raised and that there were no labor costs in the fundraising were lies and should be actionable. But the Court did not say that failure to disclose the terms of a telemarketer’s fundraising contract with its nonprofit client, nor a pitifully low return to the nonprofit, would constitute fraud per se.

As a representative of one of the nonprofit leadership groups suggested, they were pleased because the Court had limited itself to “real fraud,” that is, “affirmatively false statements to mislead donors.” The nonprofit leadership rep advised the recipients of telemarketing calls to “ask direct questions and demand honest answers.”

Come again? Essentially, the position being articulated is, If you don’t catch the telemarketer in a lie, that is, an “affirmatively false statement,” they’re free to pitch their wares for fundraising and, ahem, “educational purposes.”

What the public is being told is that truth telling in telemarketing fundraising is built on the principle of “mental reservation.” Webster’s defines a mental reservation as “the withholding, or failing to disclose, something that affects a statement, promise, etc., and which if disclosed would



Justice Ruth Bader Ginsburg authored the Supreme Court’s unanimous opinion affirming that states can crack down on charitable telemarketing fraud without violating the First Amendment.

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materially change its import." What tickles the telemarketers and their supporters is that if the donor doesn't ask the most precise question to get an absolutely certain answer, the telemarketer is off the hook. This takes us back to the interpretations of mental reservations by St. Raymond of Pennafort in the Middle Ages, when deception was defended by adding equivocations to take some lies out of the category of sins.

Apparently, the potential donor getting a fundraising call over dinner or before bedtime has to cross-examine the telemarketer with exactly the right kinds of questions to get definitive answers. Unless the telemarketer's representative is simply prone to making bald-faced lies, as in the Illinois case, or is too incompetent to come up with the equivocations and quibbles necessary to navigate the shoals of truthfulness, the telemarketer wins.

Of course, when these large nonprofits ask for money from wealthy donors or from wealthy foundations, even before being asked, they'll turn over all kinds of necessary documentation to confirm their probity, including budgets, audits and the like. Certainly, if the nonprofit represented by the telemarketer in the Illinois case had given each potential donor full documentation, donors would have learned that only 3 percent of the nonprofit's money would go to services and programs for veterans, the remainder clipped by the for-profit fundraiser or absorbed to pay for other costs.

The nonprofit leaders defending the telemarketers advise donors if they are unsure about the answers they get to "ask ... for written confirmation in the mail or research ... the group on the Internet." Sure, you bet, right after dinner!

In most Judeo-Christian interpretations of lying, using equivocations and even mental restraint has historically been permitted for the sake of maintaining peace and saving lives. St. Raymond addressed the acceptability of mental reservation using the example of facing murderers who are bent on taking the life of someone hiding in your house; lying is definitely permissible, even necessary. The Talmud and the Halakhah (Jewish law) allow lying in similarly difficult situations of maintaining peace and protecting people from harm. Telemarketing falls well short of this exception.

It will be tough to prosecute telemarketing fraud if it requires donors to parse the representations of telemarketers to determine what they are revealing, what they are withholding,

and what they mean by their use of specific nouns, verbs and punctuation marks. Most Jewish scholars reject the idea that when Jacob, masquerading as his brother, lied to his father, Isaac, by saying, "It is I, Esau, your first born," it was not really a lie if you repunctuated it to interpret Jacob as saying, "It is I; Esau is your first-born." Creative use of semicolons won't transform fundraising lies into truths.

Using free speech to justify less-than-honest telemarketing, assuming you can't get a straight answer and have to resort to Internet searches through Guidestar or the BBB Wise Giving Alliance, is no better than repunctuating Esau's lie to Isaac and calling it not exactly dishonest.

These are equivocations that simply won't stand up over time. Eventually, the public is going to revolt against being required to act like Perry Mason in court plus his aides Paul Drake and Della Street in order to get a straight story from telemarketers representing charities. Their misrepresentations, equivocations and mental reservations undermine the work of nonprofits that simply raise money by telling the truth.

The charitable fundraising standard cannot be that it's OK to withhold materially significant information so long as the donor doesn't ask for it correctly. Not telling the truth by withholding pertinent information may not be illegal, but it's not being fully honest. It would be easy to develop a standard of truthfulness that tells donors what they need to know—and that may be just as educational for donors as the public-relations efforts that national nonprofit leadership organizations are defending as the telemarketers' free-speech protected functions.

Try Mark Twain as a standard: "Always tell the truth; it will confound your friends and astound your enemies." As the "X-Files" tells us, "the truth is out there." It shouldn't require employing an FBI team on extra-terrestrials to get the truth from telemarketers.

Just as truth in advertising has become a bedrock expectation of consumers, truth in fundraising is becoming a core value demanded by increasingly skeptical donors whose trust has been weakened of late. The Supreme Court has wisely recognized that charities can reject that value only at their peril—and they cannot duck behind our cherished First Amendment freedoms to do it. ○

*Rick Cohen is executive director of the National Committee for Responsive Philanthropy.*