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Free Speech or Fraud?

By Rick Cohen

You're sitting down to dinner with your family. The telephone rings, you mumble "hello" through a mouthful of mashed potatoes, but there's no one there. You return to your dinner, the phone rings again, and a bored monotone stumbles through a solicitation. If you don't hang up thinking it's another credit card offer, you might hear a charitable pitch. And there's a good chance that the caller who just mangled your name and fumbled through the rest of the appeal works for a for-profit direct marketer.

Unfortunately, the solicitation might not reveal how much of your potential donation would go to the charity and how much to the for-profit marketer. In the instance of Telemarketing Associates' work on behalf of VietNow, a charity dedicated to the interests of Vietnam veterans, telephone donors were not told that more than 85 percent of their donation would go to the for-profit marketer.

The attorney general of Illinois has been challenging the idea that direct marketers soliciting charitable contributions do not have to reveal how much of the donation never reaches the nonprofit. The AG, however, failed to convince the lower courts in *Ryan v. Telemarketing Associates*[†] on two basic points.

One was his contention that Telemarketing's whopping 85 percent fee was excessive to the point of being fraudulent. The courts found that the percentage take of the fundraiser could not be used as a benchmark for fraudulent representation. Statutes limiting fundraising by organizations that didn't meet such benchmarks had been invalidated in prior Supreme Court decisions, including *Village of Schaumburg v. Citizens for a Better Environment* (1980) and *Maryland v. Joseph A. Munson Co.* (1984).

The other factor contributing to the AG's loss was the notion that charitable fundraising is protected speech under the First Amendment, an

[†]Although popularly known as *Ryan v. Telemarketing Associates*, the case is being decided by the U.S. Supreme Court as *Madigan v. Telemarketing Associates*. The name change reflects the election of the new Illinois attorney general.



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interpretation that suggests that requiring disclosure of the proportions going to the for-profit marketer would be unconstitutional "forced speech."

The U.S. Supreme Court is now hearing the *Ryan v. Telemarketing* case, with parties focusing on

the free-speech issue. Nearly every major nonprofit has lined up behind Independent Sector and the nonprofit wing of the Direct Marketing Association in support of VietNow and Telemarketing's right to withhold from potential donors information about fundraising costs.

In the tortured PR spin on Independent Sector's Web page, IS "asks the Supreme Court to protect charities' rights and responsibilities to educate the public on important issues in *Ryan v. Telemarketing Associates*." Spin as necessary, but telemarketing is for fundraising; cold callers reading from scripts are hardly a primary means of nonprofit education. But IS claims that the Illinois AG's call for disclosure of the amounts retained by telemarketers "would prevent honest, responsible charities from educating the public about their issues and causes."

IS points to its longstanding concern about probity and ethics in nonprofit operations, to its dissemination of nonprofit self-regulatory standards, and to existing state and federal statutes that address fraud. Will IS's call for self-policing staunch excessive and sometimes fraudulent charitable solicitations by for-profit marketers? Or is this simply one more robotic reflex on the part of major nonprofit organizations against any standards, any regulation and any public oversight?

In fairness, there are legitimate concerns. Any effort with the potential for even a glancing impact

on nonprofits' free-speech rights warrants scrutiny. This is especially true in light of the recent history of efforts such as the Istook amendment (a proposal to prohibit nonprofits from engaging in critical advocacy work) and so-called "paycheck-protection" initiatives at the state level (which would have restricted the use of donations raised through payroll deductions for public policy advocacy and organizing). The position of IS and the Direct Marketing Association, in theory, is not a defense of VietNow and its for-profit telemarketer, since plenty of reputable nonprofits suffer telemarketing fundraising failures (although in this case, the low percentage given VietNow was contractually predetermined, not the result of a failed development effort).

But it is worth taking a look at the major players. Telemarketing Associates (and Armet Inc., another telemarketer challenged by the AG) are owned by one Richard Troia, who has been investigated for his past undisclosed use of convicted felons as agents. Hey, on HBO's "Oz," a prisoner organized the maximum security Oswald Correctional Facility as a for-profit telemarketer conducting political solicitations. Real life imitates art imitating real life.

What about the telemarketing industry itself? According to the Jan. 4 Washington Post, when Douglas Palley gets a telemarketer's call, he likes to answer by saying, "I'm sorry, Mr. Palley died." It's not a bad routine for a regular citizen, but Palley is actually the president of a telemarketing company with 2,000 employees making about 20 million calls a year.

The calls made by Telemarketing and Armet on behalf of VietNow constitute only a scintilla of the 104 million calls made a day—yes, a day—by telemarketers. Telemarketing sales, including for-profit and nonprofit, reached \$274 billion in 2001 and were expected to reach almost \$300 billion in 2002. According to a 2002 report by the executive director of an affiliate of the Direct Marketing Association, \$47 billion of the \$170.6 billion raised as contributions from individuals in 2000 originated in telephone solicitations.

According to a New York State Attorney General's Office study of 588 charities and their telemarketers, VietNow kept 20 percent or less of the proceeds from fundraising efforts in 2001. On average, charities in the study retained only 31.9 percent of the funds raised by telemarketers. Among the charities most frequently falling below the average were police- and firefighter-related charities—such as police athletic leagues and scholarship programs—and veterans' organizations. In Massachusetts the AG has reported an average return to charities of 25 cents per dollar donated in telemarketing fundraising campaigns. The New York and Massachusetts reports don't say whether the telemarketers reveal to potential donors how much they keep and how much the charities get.

A BBB Wise Giving Alliance review of VietNow found that it fell short of several BBB standards. According to the BBB review, only \$100,676 of VietNow's \$3,624,289 in fiscal 2000 charitable income went for program services, the remainder going to administrative and fundraising costs. According to the Illinois AG's complaint, VietNow spent only 3 percent of its income from the telemarketers on program activities (*Chicago Tribune*, Nov. 5, 2002).

Not that it can be doing all that much given the mere trifle of funding it expends on program services, but just what is VietNow's program? The theme of VietNow is "veterans helping veterans," promoting "a positive attitude toward all veterans who have served since the Vietnam era" through POW/MIA information booths, hospital visits, picnics, potlucks and food baskets. The VietNow Web site lists numerous activities, but according to those who listened to the Telemarketing Associates pitch, a big part of the organization's services involves providing fruit baskets to needy veterans. It also lists a handful of \$1,000 and \$2,000 scholarships given to children of Vietnam-era vets.

There is no question that veterans number among those who need charitable assistance. The question is whether it is right for donors trying to help veterans (or any other group or cause) to be

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kept in the dark as to exactly how small a fraction of their donation will be used to provide such help.

The nonprofits argue that charitable solicitations by telephone involve more than simply fundraising. Telemarketers provide an educational service by promoting the name, programs and visibility of the charities, whether or not people contribute money, they claim. According to court papers, Troia's firm also generated promotional fliers and newsletters about VietNow, though they didn't reveal the pitance spent on program services.

Is it fraud for a for-profit telemarketer to take—unbeknownst to donors—the bulk of the charitable donation? Or is it free speech and public education?

Over the years our society has increasingly promoted laws that require purveyors of various products to tell the truth, as in "truth in lending" and "truth in advertising" laws. There is also a trend calling for more disclosure, although many in the charitable world seem to think that voluntary disclosure, for example, regarding corporate philanthropic grantmaking, is good enough. There is a reason for requiring truth and disclosure: The consumer—or the donor—needs information to make a wise purchase or a wise charitable gift.

It is insufficient to tell potential donors—and the telemarketers generally don't—that they can research the performance of charities at Web sites such as Guidestar, the BBB Wise Giving Alliance or Charity Navigator or by calling the charities official at their state attorney general's office. These sources offer valuable information, and donors should do more research on the groups they support. But up-front disclosure would help that potential donor whose dinner has been interrupted to make a reasoned decision about a contribution. Heck, it might even make him or her take the call, instead of slamming the receiver.

Perhaps the charities fear that required disclosure of the proportion of donations that go to telemarketers is a stalking horse for governmental regulation of fundraising standards. After bobbing and weaving around revelations of the administrative and overhead costs of Sept. 11 charities and the administrative and fundraising calculations of United Way agencies, nonprofit leaders could use *Ryan v. Telemarketing Associates* as an opportunity for a full-fledged public education campaign about the administrative and fundraising expenses of maintaining a healthy and functioning nonprofit delivery system, instead of spinning the litigation as a defense of nonprofits' free-speech rights.

Perhaps VietNow and Telemarketing Associates are hardly laudatory examples for justifying any principle, and unfortunately case law is often based on bad actors. But the nonprofit sector faces serious problems with the American public. A Brookings Institution survey conducted by Paul Light indicated that the proportion of Americans with "a lot" of confidence in nonprofits fell sharply in 2002, and those with "no confidence" doubled from 8 to 17 percent (see Paul C. Light, "Trust in Charitable Organizations," a Brookings Institution policy brief published in December 2002).

This is the time to bolster the public's confidence in nonprofits and their performance. Defending the prerogatives of nonprofits and their for-profit telemarketers to withhold information from potential donors seems to be counterintuitive in this environment. In the wake of Enron, Tyco and a host of other public accountability scandals, accountability and disclosure would seem to be the necessary watchwords. Those who call for anything less, no matter how much spin they apply, are tone-deaf.

Regardless of how the Supreme Court ultimately decides the *Ryan* case, the larger issues of accountability and truth in fundraising will need to be addressed.

The First Amendment, while precious, does not give us carte blanche to engage in every action that includes speech. We don't have the right to yell "Fire!" in a crowded theater. We don't have the right to commit fraud—although doing so almost always involves some form of speech. The concern here centers on misleading donors to believe that most or all of their donations go directly to a charity—when in fact the for-profit telemarketer pockets nearly all of their money. The issue here is fraud, not free speech. America's charities should know better than to defend the former in the guise of protecting the latter. ☺

Rick Cohen is executive director of the National Committee for Responsive Philanthropy (NCRP). Founded in 1976, NCRP is dedicated to helping the philanthropic community advance the traditional values of social and economic justice for all Americans. Committed to helping funders more effectively serve the most disadvantaged Americans, NCRP is a national watchdog, research and advocacy organization that promotes public accountability and accessibility among foundations, corporate grantmakers, individual donors and workplace giving programs. For more information on NCRP or to join, please visit www.ncrp.org, call (202) 387-9177 or use the enclosed membership form.