

Hold the Phone

Telemarketers pocket a whole lot more than they give to charity—and it's legal. Here's why.

“I believe that a simple request for money lies far from the core protections of the First Amendment as heretofore interpreted.”

— The late U.S. Supreme Court Justice William H. Rehnquist



Did you know that the bulk of the money you donate to a charity may go to the telemarketing company that solicits you—and not to the charity you think you are supporting?

Did you know that efforts by lawmakers to limit the amount of money that fundraisers or telemarketing companies can pocket for themselves have been consistently declared unconstitutional by the U.S. Supreme Court? Strange as it may seem, the Court seems to be more interested in protecting the fundraiser than in protecting the donor.

Let me explain. Under current law, and as a result of a series of Supreme Court cases beginning in 1980, the following rules are on the books:

- Professional fundraisers or telemarketing com-

panies can keep as much as 90 percent or more of the money they collect for their own expenses—giving very little to the charity involved.

- A fundraiser can't be limited in the amount of money he or she can charge.
- A state cannot require a fundraiser to be licensed.
- A state cannot require that a fundraiser disclose how much of the money collected during the previous year was used for program and administrative expenses.
- A state cannot limit the amount an organization can spend on fundraising. Organizations also can't be required to disclose this information to a donor—that is, if the donor doesn't ask.

How can this be? All of these protections for the fundraiser, telemarketer, and charity are the result of decisions by the Supreme Court that classify the solicitation of funds as “speech” protected by the First and Fourteenth Amendments. This principle was set forth by the Court in four cases, about which every donor, fundraiser, and charity should know. They are:

1 Village of Schaumburg v. Citizens for a Better Environment (444 U.S. 620; 1980) Schaumburg, Ill., passed an ordinance in 1974 prohibiting door-to-door and on-the-street solicitations of charitable contributions unless the charity uses at least 75 percent of its receipts for “charitable purpose.” *The Supreme Court held that such an ordinance was unconstitutional, because such solicitations are “protected speech” within the purview of the First Amendment.*

2 Secretary of State of Maryland v. J.H. Munson Co. (467 U.S. 947; 1984) Maryland passed a law prohibiting a charity from paying, as expenses, more than 25 percent of the amount raised. *The Supreme Court declared this unconstitutional under the First and Fourteenth Amendments.*



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3 **Riley v. National Federation of the Blind of North Carolina, Inc.** (487 U.S. 781; 1988)

A North Carolina law defined a reasonable fee for a professional fundraiser. It said that a fee of up to 20 percent of receipts collected was reasonable. A fee of more than 35 percent was presumed unreasonable, but the fundraiser might rebut the presumption by showing that the situation involved dissemination of information or that this amount was necessary for the charity to raise the money it needed. The North Carolina statute also required that fundraisers be licensed and that they must disclose to potential donors the average percentage of gross receipts turned over to the charity within the previous 12 months. *All of these provisions to protect the donor were declared unconstitutional under the free speech protection.*

4 Madigan v. Telemarketing Associates, Inc. (538 U.S. 600; 2003) The telemarketing company kept slightly more than \$6 million of \$7 million raised for a Vietnam veterans group. The Court said this was not fraud. It said the company could be charged with fraud only if the solicitor made a misleading statement. However, if he simply asked for the money and made no comment about how much was going to the charity, he could not be charged with fraud. But in this case, the fundraiser said 90 percent or more went to the veterans in response to a question, and therefore could be charged with fraud.

The late U.S. Supreme Court Justice William H. Rehnquist dissented in three of the cases above, basing his decisions on the belief that the earlier cases—used by the Supreme Court as precedents to justify its decisions in *Schaumburg*, *Munson*, and *Riley*—involved the dissemination of information and advocacy. But it seems to me that none of these facts were present in the *Schaumburg*, *Munson*, and *Riley* cases and certainly were not present in the *Madigan* case. (Rehnquist was not on the bench in the *Madigan* case, but his reasoning would certainly apply there and in *Schaumburg*, *Munson*, and *Riley*.)

To repeat: these cases were simply about soliciting money and supervising fundraisers. They did not involve advocacy or the dissemination of information. Moreover, several of the cases, quoted by the Court in the *Schaumburg*, *Munson*, and *Riley* cases, involved distributing handbills door-to-door and talking about

Jehovah's Witnesses, as well as soliciting money. Courts are particularly protective of free speech when religious groups are involved. Religious groups were not involved in *Schaumburg*, *Munson*, *Riley*, or *Madigan*.

Rehnquist made this distinction in all of his dissenting opinions. In *Schaumburg*, he said: "While (fundraising) may be worthy of heightened protection when limited to the dissemination of information ... or when designed to propagate religious beliefs ... I believe that a simple request for money lies far from the core protections of the First Amendment as heretofore interpreted." In the *Munson* case, Rehnquist stated: "Even if limitations on the fees

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charged by professional fundraisers were subjected to heightened scrutiny, however, those limitations serve a number of legitimate and substantial government interests. They ensure that funds solicited from the public for a charitable purpose will not be excessively diverted to private pecuniary gain. In the process they encourage the public to give by allowing the public to give with confidence that money designed for charity will be spent on charitable purposes."

I believe Rehnquist was correct in distinguishing between cases where the charity or fundraiser were advocating a cause or disseminating information, and cases where the issue involved only asking for money. The latter cases are not entitled to free speech protection.

It's time for donors to be aware of these cases, to ask the right questions, and to forge agreements with fundraisers that limit the amount of money they can pocket. The bulk of money raised should go to the charities involved—not to the fundraisers. The Better Business Bureau of New York suggests 35 percent as the proper amount to go to the fundraiser. That seems reasonable. Anything more than that, I believe, would be a fraudulent use of charitable funds unless this fact is told to the donor.

I assume that most donors would agree—if only they knew that the bulk of their contributions aren't always going to the charities of their choice. It's time for donors to learn the truth. ▲

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6.1%:

The rise in American donations to philanthropy in 2005 over the previous year.

Source: 2006 Giving USA

14%:

The increase in corporate giving in 2005 over the previous year, in a survey of 62 large companies by the Committee to Encourage Corporate Philanthropy in New York.