

Beyond the Basics of Fundraising: Commercial Fundraisers

09.17.15 | Linda J. Rosenthal, JD



Many charities conduct their own fundraising campaigns; some have in-house development directors and staff.

As we mentioned in "[Taking Fundraising Outside the Organization](#)," other organizations, though, need help from time to time with solicitation efforts, and turn to "fundraising counsel," "commercial coventurers", or "commercial fundraisers."

These terms are defined in the primary statutory scheme for regulation of charitable solicitation in California: the Supervision of Trustees and Fundraisers for Charitable Purposes Act, California Government Code sections 12580-12599.8. We'll call this law "the Act," although there's another statute that applies to charitable solicitation. That one's the Charitable Solicitation Disclosure Law; California Business & Professions Code sections 17510-17510.95. We'll call that the "Disclosure Act."

Summaries are great, but even the California Attorney General's office – which has issued some helpful guides like [this](#), as well as information on its website, [advises](#) "[a]ny charity or other person or organization who intends to engage in charitable solicitations...." to read the full text of applicable laws.

The substantive portions of the Act that deal with outside fundraising assistance begin at Government Code section 12599. Note, particularly, the admonition in section 12599.6(b):

A charitable organization must establish and exercise control over its fundraising activities conducted for its benefit, including approval of all written contracts and agreements, and must ensure that fundraising activities are conducted without coercion.

Commercial Fundraisers

Simply put, a commercial fundraiser is anyone who's paid to solicit "funds, assets, or property" in California for charitable purposes, and who receives or controls that money or property. It also includes anyone who "employs, procures, or engages" any paid person to solicit or control charitable donations. This definition doesn't refer to any employee or trustee of a charitable organization. Section 12599(a).

All charitable solicitation activities – by charities as well as outside fundraising firms – are regulated under California law and monitored by the Office of the California Attorney General.

But commercial fundraisers get more regulation and more scrutiny than other outsiders helping California organizations with their fundraising needs. There are registration and notice requirements, mandatory contract terms, rules about handling donations, disclosure duties, and a long list of prohibited practices.

It's fairly clear that regulators are not big fans of the commercial fundraiser method of raising money for charitable organizations. The definition of commercial fundraiser and the rules commercial fundraisers and the charities that hire them are at Government Code section 12599.

The biggest criticism by government officials is that – often – commercial fundraisers charge a hefty percentage as payment for their services; sometimes more (or considerably more) than 50% of the take.

On average, some 39.5% of the total dollars collected by commercial fundraisers in California actually was received by the contracting charities. That means that more than one-half of the contributions paid for campaign expenses and fees to fundraisers. Although this is not illegal, donors should understand that it can be a costly method of raising funds.

There were attempts to prohibit and discourage such large fees (nationwide), but they were ruled unconstitutional. "The solicitation of charitable contributions is protected speech...using percentages [of receipts collected] to decide the legality of the fundraiser's fee is not narrowly tailored to the State's interest in preventing fraud." *Riley v. National Federation of the Blind*, 487 U.S. 781, 789 (1988).

What Commercial Fundraisers Must Do

Registration

"A commercial fundraiser...shall, prior to soliciting any funds, assets, or property...or prior to receiving and controlling any funds, assets, or property," ... register with the Attorney General's Registry of Charitable Trusts" and pay the required fee and any required bond. Section 12599(b). The registration must be renewed annually.

Reporting

An annual financial report "on a form provided by the Attorney General, accounting for all funds collected pursuant to any solicitation for charitable purposes during the preceding calendar year." There must be a "detailed, itemized accounting of funds, assets, or property, solicited for charitable purposes on behalf of each [charity] ... and shall include, among other data, the following information . . . :

- Total revenue
- The fee or commission ...
- Salaries paid . . . to its officers and employees.
- Fundraising expenses.
- Distributions to the identified charitable organization or purpose.
- The names and addresses of any director, officer, or employee of the commercial fundraiser ... who is a director, officer, or employee of any [charity] listed in the ... report.

Sections 12599(c) and (d).

Giving Notice

Not less than 10 working days” before beginning each “solicitation campaign, event or service” a commercial fundraiser “shall file a notice with the Registry in the Attorney General’s Office, with specific information that (1) identifies the fundraiser and the charity; (2) lists the fundraising methods; (3) dates of starting and ending the campaign; (4) identifies the “person responsible for directing and supervising the work of the commercial fundraiser under the contract.” Section 12599(h).

Mandatory Contract

“There must be a written contract between a commercial fundraiser and a charity for each solicitation campaign, event or service.” Section 12599(i). It must be open for inspection by the Attorney General.

There is a lengthy list of required provisions about the parties, their respective obligations, the charitable purpose for the fundraising, the fee arrangement, prompt delivery of each contribution to the charity, a 10-day cooling-off period, and additional mandatory required “statements.”

Disclosures and Representations

A commercial fundraiser must, upon request by a prospective donor, disclose “the percentage of total fundraising expenses.” Section 12599(j).

“Charitable organizations and commercial fundraisers for charitable purposes shall not misrepresent the purpose of the charitable organization or the nature or purpose or beneficiary of a solicitation. A misrepresentation may be accomplished by words or conduct or failure to disclose a material fact.” Section 125996(a).

“Regardless of injury,” twelve specific “acts and practices are prohibited in the planning, conduct, or execution of any solicitation or charitable sales promotion.” Section 125996(f)(1) – (12). Many of these prohibited items involve misrepresentations of one form or another.

Retaining Records

The commercial fundraiser must keep detailed records for at least 10 years about each solicitation campaign. Section 12599.7.

Additional Disclosures

The Disclosure Act includes more rules and requirements about the conduct of charitable solicitations, as well as disclosure requirements.

The Legislature finds that there exists in the area of solicitations and sales solicitations for charitable purposes a condition which has worked fraud, deceit and imposition upon the people of the state which existing legal remedies are inadequate to correct. Many [of them] have involved situations

where funds are solicited from the citizens of this state for charitable purposes, but an insignificant amount, if any, of the money solicited and collected actually is received by any charity. Business and Professions Code section 17510(a).

“[T]he purpose of ... [the Disclosure Act] is to safeguard the public against fraud, deceit and imposition, and to foster and encourage fair solicitations and sales solicitations, wherein the person from whom the money is being solicited will know what portion of the money will actually be utilized for charitable purposes.” Section 17510(b).

This law sets out detailed requirements for solicitation disclosure cards to be presented to prospective donors. Section 17510.3 – 17510.4.

“Commercial fundraisers are legally required to disclose their identity as such prior to solicitation and must disclose their fundraising expenses and ratios upon request by a person solicited.” Section 17510.85.

The Disclosure Act also declares that “...there exists a fiduciary relationship between a charity or any person soliciting on behalf of a charity and the person from whom a charitable contribution is being solicited. The acceptance of charitable contributions by a charity or any person soliciting on behalf of the charity to use those charitable contributions for the declared charitable purposes for which they are sought...” Section 17510.8

Local Ordinances

“Many cities and counties in california require licensing, registration and financial reporting as a condition to charitable solicitation within their jurisdiction” There is a link on the Attorney General's website to a list of 200 cities and counties that have solicitation ordinances.

Conclusion

The rules and regulations on commercial fundraisers are relevant not just to them, but also to the charities which employ them. Charities are prohibited from dealing with unregistered commercial fundraisers, and the Act makes clear that charities are ultimately responsible for the acts of the commercial fundraisers.

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