FEDERAL ELECTION COMMISSION
Washington, DC 20463

June 9, 1982

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1982-35

David F. Dixon
Miller, Canfield, Paddock and Stone
Suite 300
2555 M Street, N.W.
Washington, D.C. 20037

Dear Mr. Dixon:

This responds to your letter dated May 3, 1982, requesting an advisory opinion on behalf of your client, Al Hopfman, a Democratic candidate for nomination to the U.S. Senate, regarding application of the Federal Election Campaign Act of 1971, as amended, ("the Act"), and Commission regulations to possible litigation by Mr. Hopfman.

You indicate that Mr. Hopfman anticipates filing a lawsuit to challenge "a possible denial of access to the primary ballot of the state of Massachusetts." Massachusetts law provides that a candidate may obtain access to the primary ballot by nomination papers, i.e. by petition. See Massachusetts General Laws, Chapter 53, Section 44, as amended. The Charter of the Democratic Party in Massachusetts provides that the Democratic Party will endorse the candidate who receives the majority of votes of convention delegates present and voting at the party's endorsement convention. Democratic party rules provide further that any candidate who receives at least 15% of the convention endorsement vote may challenge the party's endorsed candidate on the primary election ballot.

You indicate that while Mr. Hopfman will most likely satisfy the state petition requirement for access to the primary election ballot, he may not satisfy the party's rule requiring him to receive at least 15% of the votes cast at the party's convention, and thus may be denied participation in the Massachusetts primary election. Mr. Hopfman intends specifically to bring suit to test the constitutionality of the 15% party rule.*/ In order to defray the legal costs of such litigation, Mr. Hopfman proposes to establish a special legal expense fund to be maintained apart from his campaign funds. You indicate that donations to this fund will not be accepted from corporations, labor organizations or foreign nationals and that any unused amounts will be returned to donors. You ask whether under these circumstances funds raised by the candidate for the purpose of

defraying the costs of the described litigation are contributions subject to the provisions of the Act.

The Commission is of the opinion that funds raised by the candidate for the described legal fund established to defray litigation costs to contest the application of a particular party rule to the selection of candidates to participate in a primary election would not be considered "contributions" as defined by the Act at 2 U.S.C. 431(8)(A) and thus, funds raised for this purpose would not be subject to the Act's contribution limitations at 2 U.S.C. 441a(a). The term "contribution includes, in part, "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office...." 2 U.S.C. 431(8)(A); 11 CFR 100.7(a).

The Commission addressed a similar question in the context of Advisory Opinion 1980-57, copy enclosed. In that opinion, the Commission indicated that funds raised on behalf of a candidate for Federal office to finance a lawsuit initiated by the candidate to remove an identified potential general election opponent from the ballot were contributions subject to the provisions of the Act. The Commission concluded that the legal action engaged in by the requestor was for the purpose of influencing a Federal election since the object of the requestor's lawsuit was to eliminate the electorate's opportunity to cast a vote for his opponent.

The situation presented in this request is distinguishable from that addressed in Advisory Opinion 1980- 57. Here, the candidate is not attempting to influence a Federal election by preventing the electorate from voting for a particular opponent. Rather, the candidate proposes to use the judicial system to test the constitutionality of the application of a party rule to his candidacy where the party rule appears to preclude his participation in the primary election, even though he may satisfy the requirements of state law. A lawsuit brought by the candidate to overturn a party rule is, in this case, a condition precedent to the candidate's participation in the primary election. Thus, his activity to raise funds to defray the cost of the litigation is outside the purview of the Act.

The Commission has, on other occasions, acknowledged that the establishment of a legal expense fund for the purpose of defraying the cost of private litigation between political committees and third parties, as well as the cost of commercial litigation, falls outside the scope of the Act and Commission regulations. See Advisory Opinion 1981-16, copy enclosed.

Thus, the Commission concludes that Mr. Hopfman may establish a legal expense fund separate from his campaign funds and that he may solicit donations to the fund. Further, funds raised and used to defray the costs of the described litigation would not be subject to the contribution limitations of the Act and Commission regulations.

This response constitutes an advisory opinion concerning application of the Act, or regulations prescribed by the Commission, to the specific transaction or activity set forth in your request. See 2 U.S.C. 437f.

Sincerely,

(signed)

Frank P. Reiche
Chairman for the Federal Election Commission

Enclosures (AOs 1981-16 and 1980-57)

* In this regard, you have attached to your request a copy of an advisory opinion issued to the Governor of Massachusetts by the Massachusetts Supreme Judicial Court which opinion addresses the constitutionality of the party rule in question. The opinion indicates that the Democratic party rule requiring a candidate to receive at least 15% of the party's convention vote in order to participate in the party's primary election is constitutional.