

1 Thomas R. Adams, Esq.
Ann Broadwell, Esq.
2 ADAMS, BROADWELL & RUSSELL
400 South El Camino Real, Suite 370
3 San Mateo, California 94402
Telephone: (415) 342-1660

4 Attorneys for the City of East Palo Alto
5 and for the Individual Defendants

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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA

9 COUNTY OF SAN MATEO

10 GERTRUDE WILKS, et al.,)
11 Contestants,) NO. 275654
12 v.) DEFENDANT CITY OF EAST
13 BARBARA A. MOUTON, et al.,) PALO ALTO'S TRIAL BRIEF
14 Defendants.) RE: ABSENTEE BALLOTS

15
16 INTRODUCTION

17 * The Contestants in this case base most of their challenges
18 on votes which were cast with absentee ballots. The standards for
19 evaluating those claims are set forth both in the Elections Code
20 and in case law. Elections Code §1001 says,

21 "This division shall be liberally construed in
22 favor of the absent voter."

23 This provision has long been part of the state election law. The
24 right to vote is fundamental and is guaranteed by Article I,
25 Section 2, of the California Constitution. As the court noted in
26 Peterson v. City of San Diego, 134 Cal.App. 3d 31, 184 Cal.Rptr.
27 429 (4 DCA, 1982, hearing granted), "The paramount interest pro-
28 tected by absentee ballot is the voting franchise...the absent

1 voter's franchise is of such a fundamental nature, some small
2 sacrifice to the integrity of the election process must be made to
3 accommodate the fundamental right to vote", 134 Cal.App. 3d at 39,
4 40. That right should not be lightly denied.

5 The California Supreme Court noted in Scott v. Kenyon, 16
6 Cal. 2d 197, 201 P.2d 291 (1940), that "Great care is taken to
7 provide that, in handling and counting the absent voters' ballots,
8 the same secrecy which surrounds the casting of regular ballots at
9 the polls shall be preserved and maintained." Nevertheless, the
10 Supreme Court assumed "that slight variations from the procedure
11 provided for in the statute ought not to prevent the counting of
12 such [absentee] votes", 16 Cal. 2d at 204.

13 The Court's statements in Scott v. Kenyon, are based on a
14 long line of other California Supreme Court cases establishing a
15 strong policy that, "It is a primary principle of law as applied
16 to election contests that it is the duty of the court to validate
17 the election if possible. That is to say, the election must be
18 held valid unless plainly illegal", Rideout v. City of Los
19 Angeles, 185 Cal. 426 (1921). "Courts are reluctant to defeat the
20 fair expression of popular will in elections and will not do so
21 unless required by the plain mandate of the law", Simpson v. City
22 of Los Angeles, 40 Cal. 2d 271 (1953).

23 The California Supreme Court has refused to count ballots
24 only for such gross violations as moving the polling place on
25 election day, election officials being too intoxicated to perform
26 their duties, allowing the ballot box to float back and forth
27 across the county line on election day, (Knowles v. Yeats, 31 Cal.
28 82 (1866)), opening the polls three and a half hours late (Tebbe

1 v. Smith, 108 Cal. 101 (1895)), placing distinguishing marks on
2 one's ballot (Kirk v. Rhoads, 46 Cal. 398 (1873)), twice as many
3 votes being cast as registered voters, voters not being registered
4 (Russell v. McDowell, 83 Cal. 70 (1890)), actual tampering with
5 absentee ballots (Scott v. Kenyon, 16 Cal. 2d 197, 201 P.2d 291
6 (1940)), and votes cast by non-residents. (Garrison v. Rourke, 32
7 Cal. 2d 430 (1948), Canales v. City of Alviso, 3 Cal. 3d 118
8 (1970)).

9 The Court has not set aside votes where election officers
10 let the ballot box out of their sight (Whipley v. McKune, 12 Cal.
11 352 (1859)), where the votes were not canvassed immediately after
12 the polls closed (Atkinson v. Lorbeer, 111 Cal. 419 (1896)), where
13 there was no competent evidence as to how an illegal voter voted
14 (Lauer v. Estes, 120 Cal. 652 (1898); Smith v. Thomas, 121 Cal.
15 533 (1898)), where the polls were opened slightly late (Packwood
16 v. Brownell, 121 Cal. 478 (1898); Kenworthy v. Mast, 141 Cal. 268
17 (1903)), and where the ballot box was not kept as safely as it
18 might have been (Huston v. Anderson, 145 Cal. 320 (1904)).

19 The California Supreme Court has stated, "a distinction has
20 been developed between mandatory and directory provisions in
21 election laws; a violation of a mandatory provision vitalates the
22 election, whereas a departure from a directory provision does not
23 render the election void if there is a substantial observance of
24 the law and no showing that the result of the election has been
25 changed or the rights of the voters injuriously affected by the
26 deviation", Rideout v. City of Los Angeles, 185 Cal. 426, 430
27 (1921).

28 In Packwood v. Brownell, 121 Cal. 478 (1898), where there

1 was a "slight delay" in opening the polls, the Court stated, "We
2 may admit that the provision is mandatory, but even mandatory pro-
3 visions of the election law are to be liberally construed", 121
4 Cal. at 480. The Court further held that a contestant must "show
5 a transgression of the statute inconsistent with an honest and
6 intelligent endeavor to obey its command, or that the violation of
7 its letter on which he relies has operated to obstruct the full
8 and fair expression of the suffrage of the precinct," 121 Cal. at
9 481.

10 The Court has held that "the Legislature did not mean that
11 the returns of a candidate should be set aside when an election
12 was held, at the proper time and place, and for the proper
13 offices, unless it affirmatively appeared that there was such
14 irregularity as affected the result of the election; and when
15 these irregularities of mode occur, it rests with the contestant
16 to show that they changed the result...the contestant must show
17 that the election was not only conducted irregularly, but that in
18 consequence of irregularities, the declared result was different
19 from what it otherwise would have been," Whipley v. McKune, 12
20 Cal. 352 (1859).

21 Mandatory provisions are those concerning the time and
22 place of holding the election, and concerning the qualifications
23 of voters People v. City of Los Angeles, 133 Cal. 338 (1902).
24 "'As a general rule, however, the regulations prescribed by law
25 for conducting an election are directory merely, and will not be
26 literally enforced, where their nonobservance has occasioned no
27 injury' [citations omitted]", Atkinson, supra, 111 Cal. at 422.

28 In summary, the Elections Code sections dealing with

1 absentee voters are to be liberally construed in favor of the
2 absent voter; the paramount interest protected by the absentee
3 ballot is the voting franchise; slight variations in procedure
4 ought not to prevent the counting of absentee votes; an election
5 must be held valid unless plainly illegal; elections should be set
6 aside only for gross violations of the statutes; and both manda-
7 tory and directory provisions of the Elections Code are to be
8 liberally construed.

9 ELECTIONS CODE §1013

10 Against this background, the Contestants claim that certain
11 absentee ballots cannot be counted because of alleged violations
12 of Elections Code §1013. That section provides,

13 After marking the ballot, the absent voter may
14 return it to the official from whom it came by mail or
15 in person, or may return it to any member of a pre-
16 cinct board at any polling place within the jurisdic-
17 tion. The ballot must, however, be received by either
18 the official or the precinct board before the close of
19 the polls on election day.

20 The official shall establish procedures to insure
21 the secrecy of any ballot returned to a precinct pol-
22 ling place. [Emphasis added]

23 The Contestants claim that some absentee voters gave their ballots
24 to third parties for return to the county clerk, instead of
25 delivering them to the clerk in person. The Contestants do not
26 claim that these votes were tampered with. Nevertheless, they
27 claim that these votes were illegal and should not be counted.

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A. Case Law

Elections Code §1013 must be construed in favor of the absent voter under Elections Code §1001. It is clearly directory, in that it uses "may" instead of "shall"¹ and in that it does not concern the time or place of holding an election or the qualifications of a voter.² Therefore, under the authorities cited, supra, should not be fatal, unless actual fraud can be shown which changes the result from what it would otherwise have been.

There is only one California Supreme Court case dealing specifically with absentee ballots. In Scott v. Kenyon, supra, the city council had the duty to tally the election returns. On election night, the elections board prepared an unofficial canvass of the votes, including nine absentee ballots. All of the ballots were then given to the city clerk to keep until the official canvass. The ballot box was kept in the clerk's residence, with the key in the lock on the box and both the regular ballots and the opened absentee ballots inside. When the city council opened the box six days later for the official canvass, four of the absent voters ballots were missing.

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¹Elections Code §11 says, "'shall' is mandatory and 'may' is permissive".

²Qualifications are citizenship, age and residence. See Elections Code §100 and Section 2, Article II of the California Constitution.

1 The Court stated, "Assuming that slight variations from the
2 procedure provided for in the statute ought not be prevent the
3 counting of such votes, that is not the situation here where
4 practically every provision of the statute was violated and where,
5 in fact, secrecy was not maintained", Scott, supra, 16 Cal. 2d at
6 204. The Court continued, "We therefore hold that there must be
7 substantial compliance with the essential requirements of the
8 absent voters' law with respect to the counting of the votes, and
9 that such substantial compliance does not appear here." Scott
10 supra, 16 Cal. 2d at 204 (emphasis added).

11 The issue in the case at bar is whether delivery of
12 absentee ballots to the county clerk by a third person is "sub-
13 stantial compliance" with the provisions for returning absentee
14 ballots. Those provisions must be interpreted liberally in favor
15 of the absent voter, and in light of Scott, supra. There are two
16 court of appeal decisions on this issue, and they are conflicting.

17 In Shinn v. Heusner, 91 Cal.App. 2d 248, 204 P.2d 886 (3
18 DCA, 1949), the court interpreted three former Elections Code
19 sections: §5911, which required that the absentee ballot be
20 returned "by mail, postage prepaid, to the officer from whom it
21 was received", §5931 which provided that the absent voter "may
22 mark his ballot and transmit it to the clerk by mail", and that
23 after voting his ballot, he "shall...mail it to the office of the
24 clerk...", and §5930 which permitted the absent voter to "appear"
25 at the clerk's office to vote (the full text of Elections Code
26 §§5911, 5930 and 5931 is set forth in Exhibit "A" attached
27 hereto).

28 Although absent voters were directed to mail their ballots,

1 it was alleged in Shinn, supra, that a candidate for supervisor
2 "procured from the county clerk applications for absentee voters
3 ballots and the ballots simultaneously...he saw how certain people
4 voted such absentee ballots...he, instead of the voters, folded
5 the ballots in many instances, enclosed them in identification
6 envelopes, and himself sealed the envelopes, that he swore to a
7 false affidavit on such envelope in contravention of section 5911
8 of the Elections Code, that he required electors to vote absentee
9 ballots,...that with the connivance of the county clerk he went to
10 the home of one elector who had properly requested such a ballot,
11 and 'voted this elector'", Shinn supra, 204 P.2d at 888.

12 The court noted that, "The gravamen of appellants' com-
13 plaint is that illegal votes were cast, that is, absentee
14 ballots", Shinn, supra. The appellate court then approved the
15 judgment of the trial judge, who said that "it is the duty of the
16 court to validate an election [unless it is] impossible, and that
17 it must be held valid unless plainly illegal. He then said that
18 from a careful review of the evidence...that he could find no war-
19 rant for making any finding...that there was substantial departure
20 from the prescribed voting procedure diminishing the result
21 declared, or affecting or violating the secrecy or integrity of
22 the votes cast...", Shinn, supra.

23 Thus, even though the Elections Code required absentee
24 voters either to vote in person at the county clerk's office or to
25 mail the ballot to the clerk, the court found those provisions to
26 have been substantially complied with. In Shinn, the court found
27 that the candidate engaged in "receiving applications for absentee
28 ballots, delivering ballots in response thereto, and in the

1 reception from the voters of their voted identification envelopes
2 and the return of same to the county clerk's office", Shinn,
3 supra. The trial judge concluded.

4 The evidence in the case has been carefully
5 reviewed and scrutinized to determine if any of the
6 facts relied on as a cause for complaint could be
7 fairly held to affect the result declared by the
8 canvassing board, or could be held as a fact
9 sufficient to impeach the integrity of the absentee
10 votes cast at the election had; and the Court is of
11 the opinion that none has been shown of such invali-
12 dating nature, and the Court is further of the opinion
13 that the voters attacked were legally cast by the
14 voters, and that to disregard or reject them would be,
15 without warrant, to disfranchise these voters.
16 (Shinn, supra)

17 The appellate court agreed, noting that the chapter of the
18 Elections Code entitled "Absent Voting" provides, "This chapter
19 shall be liberally construed in favor of the absent voter", Shinn,
20 supra.

21 In Beattie v. Davila, 132 Cal.App. 3d 424, 183 Cal.Rptr.
22 179 (5 DCA, 1982), the court held that absentee ballots could be
23 given by voters to third parties for mailing to the county clerk.
24 The court also noted that under Elections Code §1013, absentee
25 ballots may be given to third parties for delivery to the precinct
26 board, Beattie, supra, 132 Cal.App. 3d at 430, 183 Cal.Rptr. at
27 182. (Accord: Bollinger, "California Election Law During the
28 Sixties and Seventies: Liberalization and Centralization", 28C
West's Ann. Elec. Code (1977 ed.) pp. 122-123). Shinn held that
absentee ballots could be given to a third person for delivery to
the county clerk. Thus, under Shinn and Beattie, an absent voter
may have a third person deliver the voted ballots to the county
clerk, the mailbox or the precinct board.

Nevertheless, with complete absence of analysis, the

1 appellate court in Fair v. Hernandez, 138 Cal.App. 3d 578, 188
2 Cal.Rptr. 45 (4 DCA, 1982) held, in contradiction to Shinn, that
3 while absentee ballots can be given to third parties for delivery
4 to the mailbox or delivery to the precinct board, they cannot be
5 given to third parties for delivery to the county clerk.

6 The court in Fair did not discuss or refer to Elections
7 Code §1001 requiring liberal construction in favor of the absent
8 voter, ignored the policy in favor of upholding elections, did not
9 discuss whether §1013 was directory or mandatory, and did not
10 mention Shinn, supra.

11 The court merely asserted that, "ballots may be voided even
12 though it is not shown that the ballots were actually tampered
13 with", citing Garrison v. Rourke, 32 Cal. 2d 430, 443, 196 P.2d
14 884 (1948), and relies on an Attorney General's Opinion (62 AG 439
15 (1979)). In Garrison, a voter received a ballot at a polling
16 place and then stepped outside to chat with a candidate before
17 going back inside to vote. The case has nothing to do with
18 absentee ballots and involved Elections Code section's requiring
19 voters to stay inside polling places until they have voted.

20 The decision in Fair, and the Attorney General's Opinion
21 upon which it relies, do not give any reason for finding a statute
22 which uses "may" mandatory. They do not compare §1013 with §1007,
23 which uses "shall" in requiring the county clerk to mail or
24 deliver absentee ballots to voters in person.³ They do not
25 apply the California Supreme Court's policy of upholding

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27 ³Section 1007 provides in relevant part, "If the official
28 deems the applicant entitled to an absent voter's ballot he shall
deliver by mail or in person the appropriate ballot.

1 elections, and of requiring "substantial" compliance with
2 directory provisions of the Elections Code unless actual fraud is
3 shown. Fair results in the disenfranchisement of innocent voters,
4 contrary to statutory provisions and decisions of the California
5 Supreme Court.

6 Shinn v. Heusner is consistent with decisions of the
7 California Supreme Court. It follows Elections Code §1001 in
8 interpreting the requirements for absentee ballots liberally in
9 favor of the absent voter. It finds substantial compliance with
10 those provisions even though absentee ballots were delivered to
11 the clerk by a third person. It follows the policy of upholding
12 elections unless fraud is clearly shown. It harmonizes all
13 sections of Elections Code §1013 by permitting delivery of
14 absentee ballots by a third person to the precinct board, the
15 mailbox or to the county clerk. Fair v. Hernandez is an isolated
16 decision which does not follow any California Supreme Court
17 decisions and it should not be followed by the trial court.
18 Shinn v. Heusner is in the mainstream of case law and should be
19 followed by the trial court.

20 B. Constitutional Issues

21 A compelling reason for following the ruling in Shinn is
22 that it avoids serious constitutional issues raised by Fair. The
23 result in Fair is that absentee ballots can be delivered to third
24 parties for mailing or for delivery to the precinct board, but not
25 for delivery to the county clerk. Fair causes §1013 to distin-
26 guish between classes of absentee voters, with no compelling
27 reason for doing so, in violation of both the due process and
28 equal protection clauses of the California and United States

1 Constitutions.

2 There is no greater likelihood that the third party will
3 tamper with the absentee ballot on the way to the county clerk's
4 office than on the way to the precinct board or the mailbox. The
5 decision in Fair puts the absent voter at the mercy of a third
6 party, who may decide to go to the county clerk's office instead
7 of to the precinct board or to the mailbox. The franchise is the
8 cornerstone of our form of government and cannot be denied so
9 arbitrarily. The decision in Shinn is in accordance with case law
10 and does not involve the constitutional issue created by Fair.
11 Statutes must be construed to avoid constitutional issues, as was
12 done in Shinn v. Heusner.

13 C. No Injury Has Been Shown

14 If the court decides, under Fair, that absentee votes were
15 improperly given to a third party and delivered to the county
16 clerk, the Contestants must still show that they have been injured
17 by that act, that the ballots have been tampered with, as dis-
18 cussed supra. "[T]his proof is not made by a naked showing that
19 it was possible to have molested them. The law cannot guard
20 against a mere possibility, and no judgment of any of its courts
21 is ever rendered upon one", Huston v. Anderson, 145 Cal. 320
22 (1904).

23 ELECTIONS CODE §1007

24 There are no cases interpreting Elections Code §1007, which
25 provides that the elections officer "shall deliver by mail or in
26 person the appropriate [absentee] ballot". The Contestants claim
27 that blank ballots were not mailed to absent voters at their
28 registered addresses, but were mailed to other addresses. The

1 Contestants further claim that these ballots were then picked up
2 at the "other" address and delivered to the voter by a third
3 party. They claim this violates Elections Code §1007.

4 First, it must be noted that the very purpose of absentee
5 voter provisions is to allow voters to vote when they are absent
6 from home. Naturally, ballots will not be mailed to a person's
7 residence in such a case. Nothing in the Elections Code requires
8 such ballots to be mailed to the voter's registered address.

9 Second, it will frequently be the case that when ballots
10 are mailed to another address, the recipient of mail at that
11 address will receive the ballot and deliver it to the voter.
12 Thus, if the voter is staying at a hotel, the ballot will be
13 delivered to the voter by the hotel clerk, who received it in the
14 mail. If the voter is visiting friends or relatives, they will
15 receive the ballot in the mail and then deliver it to the voter.
16 There is nothing in the Elections Code which prohibits this, and,
17 indeed, it furthers the purpose of the absent voters' law. (It
18 should be remembered that this section deals with blank ballots;
19 they have not yet been voted.)

20 For all of the reasons discussed under §1013, mailing the
21 ballot to an address and its subsequent delivery to a voter by a
22 third person should not invalidate the ballot subsequently cast.
23 In addition, the court in Shinn found nothing improper about
24 ballots being delivered by third parties. Absentee ballots were
25 counted even though the candidate engaged in "receiving applica-
26 tions for absentee ballots [and] in delivering ballots in response
27 thereto", Shinn, 204 P.2d at 889.

28 Requiring that absentee ballots be mailed only to the

1 voter's residence would totally defeat the provisions of the
2 absent voters' law. People would be unable to vote when they were
3 absent from the precinct. Such a construction of the statute
4 cannot be permitted.

5 The law must be interpreted liberally in favor of the
6 absent voter. Even mandatory provisions of the Elections Code are
7 to be liberally construed. The purpose of the statute must be
8 furthered.

9 There is nothing in the Elections Code which would support
10 the Contestants' claims of violation of §1007 and such claims
11 should be dismissed.

12 REMEDY FOR ILLEGAL VOTES

13 If this Court does determine that illegal votes were cast,
14 then the illegal voters may be asked how they voted. If there is
15 no evidence as to how they voted, their votes must be divided
16 equally between "yes" and "no" votes, Russell v. McDowell, supra;
17 Singletary v. Kelley, 242 Cal.App. 2d 611, 51 Cal.Rptr. 682
18 (1966). If there is clear and convincing evidence as to how they
19 voted, their votes must be deducted from the side they voted for,
20 Garrison v. Rourke, supra; Scott v. Kenyon, supra. If the
21 evidence is confusing or if the voter's testimony is impeached,
22 the vote cannot be deducted from either side, Smith v. Thomas,
23 supra; Lauer v. Estes, supra.

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CONCLUSION

The claims of delivery of absentee ballots by third parties to voters and to the county clerk do not violate Elections Code §1013 or §1007. Those provisions are to be liberally construed and the voters who cast those votes should not be disenfranchised.

Dated: July 29, 1983

Ann Broadwell
Attorney for City of East Palo Alto and Individual Defendants

EXHIBIT "A"

Former Elections Code Sections

§5911: Same: Form for affidavit on identification envelope: False statement of material matter. The identification envelope shall have printed on its face a declaration substantially in the following form:

IDENTIFICATION ENVELOPE

State of.....)
) ss.
County of.....)

..... declares: I am a resident of and a voter in, Precinct, in the City or Town of, County of, State of California, and I herein enclose my ballot in compliance with Chapter 5, Division 8, of the Elections Code, I declare under the penalty of perjury that the above declarations are to the best of my knowledge and belief true and correct.

.....
Date of Signing
(Signature)
.....
(Residence Address)

Notice.--When voting outside the office in which this ballot was issued, you must immediately return it by mail, postage prepaid, to the officer from whom it was received.

§5930: Appearance before officer in place of residence: Marking and sealing ballot: Making out and signing declaration: Comparison of signatures: Deposit of envelope. Any voter applying for and receiving an absent voter's ballot may, on any date prior to the date of election for which the ballot is to be voted, appear at the office of the clerk of the county, municipality or district in which he resides and stamp or mark with pen or pencil, and seal his ballot under the scrutiny of that officer, and in the following manner:

(a) The voter shall first display the ballot to the clerk as evidence that it is not marked, and shall then proceed to mark the ballot in the presence of the clerk, but in such manner that the officer is unable to see how it is being marked. The voter shall then fold the ballot and enclose it in the identification envelope.

(b) The voter shall then make out or cause to be made out and sign to the declaration printed on the face of the envelope and deliver it properly sealed to the officer before whom the ballot is marked.

(c) Upon receipt of the envelope the clerk shall compare the signature thereon with the signature upon the original affidavit of registration and the place of residence as stated on the envelope with that in the affidavit of registration. If it appears that the signature on the envelope is that of the person who signed the original affidavit of registration and that the place of residence as shown thereon is in the same precinct as appears on the affidavit, he shall deposit the envelope in a safe place in his office, to be kept by him and delivered to the proper canvassing board.

§5931: Marking and transmission of ballot: When authorized: Placing in identification envelope: Filling out and signing declaration: Mailing: Comparison of signatures and residence: Deposit of envelope. At any time on or before the date of an election an absent voter, regardless of whether he is within or without the territorial limits of the United States, may mark his ballot and transmit it to the clerk by mail if:

(a) In the case of any election conducted by the county clerk he is absent from his election precinct, or

(b) In the case of any other election, he is absent from the city or district of his residence, or

(c) He is unable because of disability to go to his polling place.

After marking his ballot the absent voter shall place it in the identification envelope. He shall then fill out and sign the declaration on the envelope and mail it to the office of the clerk of the locality in which he resides.

Upon receipt of the envelope the clerk shall compare the signature thereon with the signature upon the original affidavit or registration and the place of residence as stated on the envelope with that in the affidavit of registration. If it appears that the signature on the envelope is that of the person who signed the original affidavit of registration and that the place of residence as shown thereon is in the same precinct as appears on the affidavit, he shall deposit the envelope in a safe place in his office to be kept by him and delivered to the proper canvassing board.

PROOF OF SERVICE

(C.C.P. §1013a, §2015.5)

I declare that I am employed in the County of San Mateo, California. I am over the age of eighteen (18) years and not a party to the within entitled cause; my business address is 400 South El Camino Real, Suite 370, San Mateo, CA 94402.

On July 29, 1983, I served the attached DEFENDANT CITY OF EAST PALO ALTO'S TRIAL BRIEF RE: ABSENTEE BALLOTS on the parties involved in said cause by personal service, as follows:

Paul N. McCloskey, Jr.
BROBECK, PHLEGER & HARRISON
Two Palo Alto Square
Palo Alto, CA 94304

Thomas Daniel Daly
Assistant District Attorney
County of San Mateo
Hall of Justice and Records
401 Marshall Street
Redwood City, CA 94062

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 29th day of July, 1983, at _____,
California.
