

Patent Policing

Public Patent Foundation Executive Director Daniel Ravicher says "false marking" leads to "a chilling effect" on patent competition.

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Driving Force

When it comes to e-discovery in government probes, companies need to make preservation of hard drives a priority. See *Practice Center*.

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LAB TEST

Fiasco for DA's office is feast for defense bar

By **Kate Moser**
RECORDER STAFF WRITER

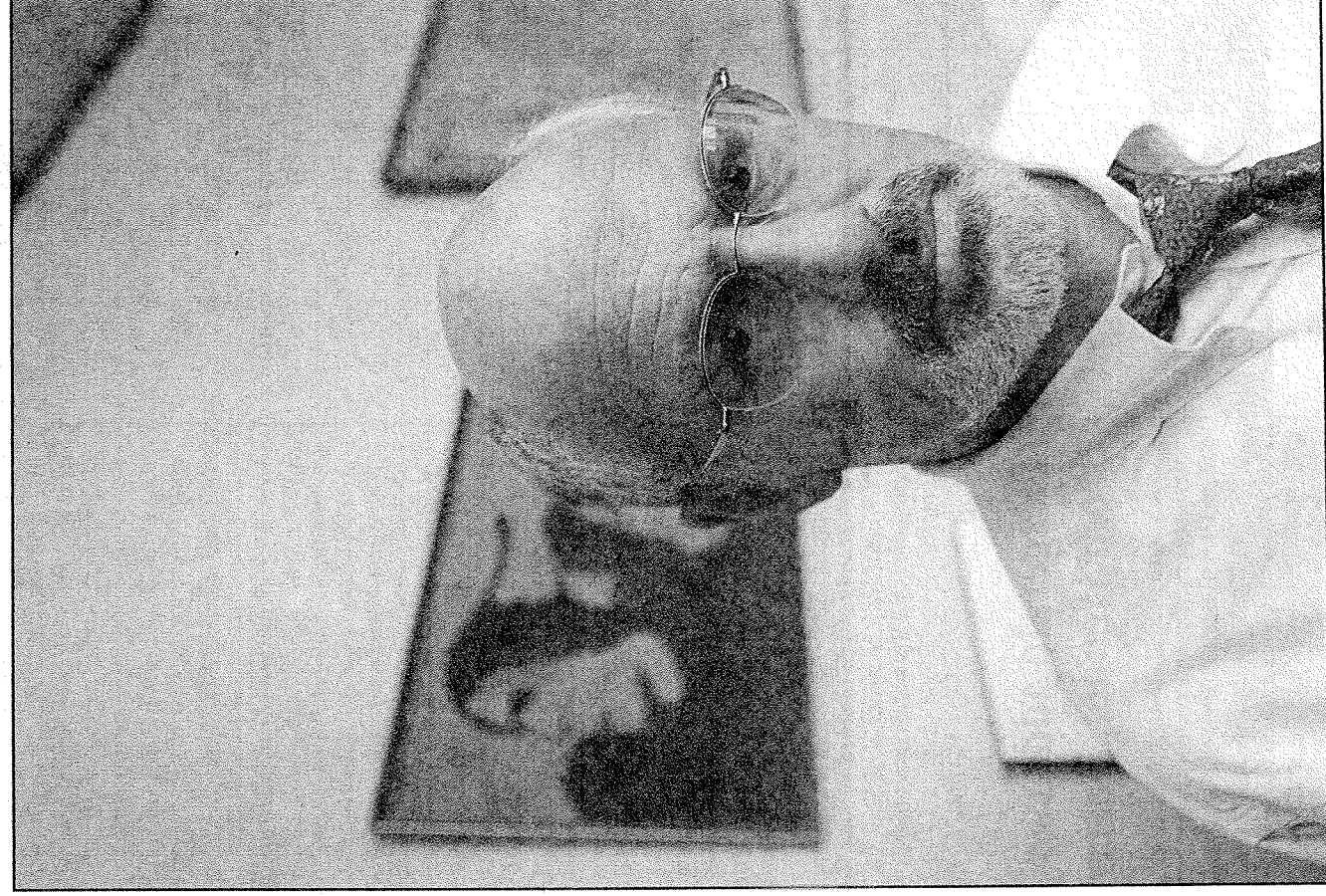
In a federal gang murder case last year, criminal defense attorney John Philipsborn tried to get U.S. District Judge Maxine Chesney to hold a hearing on the integrity of drug evidence coming out of the San Francisco crime lab. He didn't get far.

But now, Philipsborn and his client, Dennis Cyrus Jr., are getting a real chance to raise drug lab concerns with the court — nearly a year after a federal jury convicted Cyrus but before he's sentenced.

That's because the trial featured testimony from Deborah Madden, the criminalist in San Francisco's crime lab accused of taking drugs from evidence samples. Philipsborn and co-counsel James Thomson are asking Chesney to hold off on sentencing while they seek access to audit reports on lab procedures and documents dealing with the police investigation of Madden. The longtime lab employee is expected to be arraigned today in San Mateo County Superior Court on one count of felony possession of a narcotic in relation to a search warrant executed at her home by a San Francisco police special investigations unit in early March.

The extent of the fallout from Madden's work in the lab continues to grow: First

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NOT JUST DRUG CASES: John Philipsborn filed papers this week for a client convicted of three murders at a federal trial last year that included testimony from Deborah Madden, the S.F. crime lab worker accused of skimming drugs.

JASON DOY

Whistle-blower bill extended to court staff

By **Cheryl Miller**
RECORDER STAFF WRITER

SACRAMENTO — For weeks, a political detente has surrounded legislation that would extend whistle-blower

protections to Administrative Office of the Courts employees. The AOC wasn't thrilled with the bill, but leaders accepted it. Judges were OK with it and, of course, most AOC workers seemed to think it was nifty.

That all changed last week when the bill's primary author, Assemblywoman Bonnie Lowenthal, D-Long Beach, expanded her measure to cover all judicial branch employees — from the courthouse janitor

to the Supreme Court clerk — who sound the alarm about workplace wrongdoing.

"Whistle-blower protection isn't just about protecting employees, it's about protecting taxpayers and tax dollars," Lowenthal said Friday. "And we want to protect as many of those as we can. Especially now."

The state's judges, however, don't like the bill's new reach.

The California Judges Association "is greatly concerned with the notion of applying whistle-blower statutes to the trial courts without first doing extensive study," said CJA President Michael Vicencia.

The amended legislation specifically exempts judges. But they're never keen on rules that could challenge their courtroom authority. What if, they say, a clerk tells a reporter that a judge's rulings

consistently discriminate against women? The furious judge complains to the court administrator, who in turn disciplines the clerk. Can the clerk then claim whistleblower retaliation by the administrator? Egregious violators can be fined up to \$10,000 and face up to a year in jail.

"We're going to have to look at this bill very, very carefully," Vicencia said. "This appears to be fraught with many, many unintended consequences."

The bill also presents a political pickle for Assembly Judiciary Chairman Mike Feuer, D-Los Angeles. Feuer is married to Los Angeles County Superior Court Judge Gail Ruderman Feuer, and he's been careful to avoid any appearance of cheerleading pro-judge legislation. If he supports the amended version of the bill, he risks angering judges. And the amend-

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Facebook bans employees from selling shares

By **Zusha Elinson**
RECORDER STAFF WRITER

Facebook has a message for its employees selling stock: Don't.

The company instituted a new insider trading policy Friday morning that prohibits employees from selling their Facebook shares unless a trading window is opened, people working on the project said. It also warns employees not to tip outsiders who might buy or sell based on the inside information.

The policy, announced internally, comes in response to the rise of online trading sites, such as Sharespost.com, that allow anyone to buy or sell shares of companies like Facebook, Yelp, Twitter and others that have yet to go public.

The motivation for the new policy, according to a person who worked on it, is to prevent legal messes that could arise from these changes, like lawsuits from unhappy buyers — as a private company, Facebook doesn't release financial results — and insider trading claims. Facebook wants to avoid "the risk that gets introduced on the legal side when it comes to the distribution of confidential information," this person said, speaking on the condition of anonymity.

Securities lawyers said those are legitimate legal concerns, but added that there are other serious implications if Facebook stock is sold willy-nilly. One is the 500-shareholder rule, which holds that any company with more than 500 shareholders must bare its soul to the world like any other public company.

"I'd worry less about the individuals' insider trading liability and more about losing control of my shareholder base and having to file to become a public company," said Robert Day, a corporate and securities lawyer at Wilson Sonsini Goodrich & Rosati.

That's what happened to Google, which was forced to go public in 2003 because it had more than 500 shareholders. The shareholder rule doesn't cover option grants. A person familiar with Facebook said that the company has not crossed the 500-shareholder threshold.

These online exchanges also set a market price that the companies might find unrealistically low or high, said Brian Erb, a Ropes & Gray partner in San Francisco who has studied the issue. For instance, Facebook is valued at approximately \$12 billion on Sharespost.com's index.

"I can imagine a company would be unhappy to have a bunch of trades occurring at 50 cents when they think they're worth more," said Erb.

Companies such as Sharespost.com and Secondmarket.com have sprouted up in the past two years, following an SEC rule change that relaxed restrictions on selling shares of private companies. Sellers can post shares for sale and buyers can make offers. For instance, someone is offering 8,000 shares of electric luxury car startup Tesla Motors for

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LAB

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the San Francisco district attorney's office said only a half-dozen cases might be promised, then began to drop hundreds of cases. Now, with the investigation of the lab expanded to look at the potential involvement of other crime lab employees, the DA's office last week was analyzing 1,400 pending felony narcotics cases they might be forced to drop. And while prosecutors scramble, defense attorneys are doing their part to broaden the implications beyond pending cases, beyond superior court prosecutions, and beyond the criminal courthouse.

Assistant District Attorney Brian Buckelew, a spokesman for the office, said Friday that it's still unclear how far the crime lab implications reach, and that the office strategy is an individualized review of cases. "We're going to salvage the cases that we can salvage," he said. On Friday, the DA's office dropped 25 more narcotics cases.

San Francisco Public Defender Jeff Adachi said a recent audit of the crime lab indicates institutional problems bigger than Madden, and that his office has identified about 5,500 pending and post-conviction drug cases since 2008 for which it's preparing to file motions or writs of *habeas corpus*.

The audit indicates "problems with chain of custody, access to evidence, access to other technicians' envelopes and a lack of protocol," Adachi said. "When you look at each of those things separately or together, from the standpoint of the defense bar, any drug case that goes forward at this point is likely to involve a lengthy if not endless inquiry into that subject."

As it sifts through cases, Adachi's office is looking at four general courses of action: motions to dismiss pending cases; motions in post-plea, pre-sentence cases; motions to withdraw pleas; and writs of *habeas corpus*. Since the scandal broke, private defense lawyers have seen case after case dropped.

They are also hearing from past clients, and they say the ground has been prepared for credible arguments on why people should be set free over the tainted evidence.

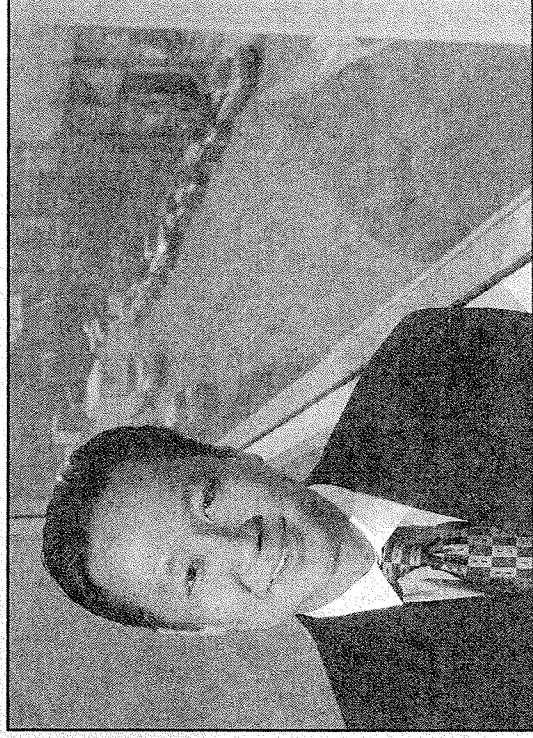
"There are people in custody in state prison and county jail who are calling and writing their attorneys vigorously over the last week saying 'Get me out of here,'" said criminal defense attorney Theodore Cassman. "I think the burden is on [defendants] a little bit more to show there was an inadequacy in the procedure, but I think there's almost going to be a presumption that that's true."

Evidence contamination isn't the only potential problem that's come to light. Madden was convicted on a misdemeanor domestic violence charge in San Mateo in 2008, according to the San Mateo district attorney's office. Because of that, defense attorneys say they can allege that prosecutors failed to provide impeaching information about Madden in all drug cases coming out of San Francisco since 2008.

"There's a strong argument that conviction involves moral turpitude," said San Francisco solo criminal defense lawyer Bobbie Stein. "So this could have been exculpatory material by way of impeachment and therefore [a *Brady* violation]."

As for Madden's alleged thefts, it's still unclear who knew what and when, according to the police department, which is responsible for the crime lab. "Who knew about it, when they notified members of the police department, when the district attorney's office was informed — that's all part of the investigation," said Assistant Chief Jeff Godown of the S.F. police department. That investigation is ongoing, he added. Police Chief George Gascon said last week it would take six to eight weeks.

For the DA's part, Buckelew said the office was first contacted by police about the Madden problem Feb. 23. He said the office was also first informed of Madden's 2008 do-



NONSTOP FIGHT: "From the standpoint of the defense bar," says San Francisco Public Defender Jeff Adachi, "any drug case that goes forward at this point is likely to involve a lengthy if not endless inquiry."

RECORDER FILE (2004)

estic violence conviction around that date. Defense lawyers say they first heard of the problems from news reports two weeks later.

Apart from the jockeying in hundreds and possibly thousands of individual cases, the scandal could prompt litigation that would force the creation of an independent crime lab in San Francisco.

Cassman, a former California Attorneys for Criminal Justice president, said he has urged the group and the ACLU to sue the police department for an urgent remedy, such as injunctive relief. When a crime lab is under the roof of the police department, Cassman added, criminalists become part of the prosecution team. "They are no longer scientists, it's ferreting out crime."

RIPPLE EFFECT

The revelations about Madden have tantalized defense lawyers, as has the response thus far from the DA's office.

There are hints that it won't be just Madden's drug cases at risk: The audit of the lab's controlled substances unit mentioned a slew of problems, including the contention that shoddy practices at the lab meant analysts could access evidence in each other's cases without documenting it. And other audits are coming, including a mid-April audit of the lab's DNA testing by the attorney general's office.

"We have no indication that there are issues with the DNA portion of the lab," Godown said Friday. "We want to make sure that everything is true and correct even in DNA."

In the meantime, public defenders and private defense counsel are working furiously to compel the DA's office to produce its file on Madden for individual cases. The documents being sought include the investigative file of the DA's office and the police department on Madden, some personnel files and crime lab audits spanning several years.

After Judge Anne-Christine Massullo went through the file in a narcotics case last month and said parts of it had to be turned over, prosecutors chose to dismiss the case instead.

"We're fighting to get those documents because we're not going to know the scope of this until we do," Adachi said. "The intrigue behind not releasing the documents in many ways has intensified our interest."

Buckelew disputed the defense theory that prosecutors are dropping cases to prevent the documents from getting out. "I think that's borne out of frustration that they haven't seen the documents," he said. "Transparency is going to be part of addressing this problem. We hope that the documents will be made public really as soon as possible."

Judge Charles Haines has appointed Judge Susan Breall to be something of a gatekeeper of the Madden documents, so defense motions on that material are being heard in Department 23. Though prosecutors have dropped hundreds of cases already, and may need to dismiss hundreds more, Buckelew has said that many drug cases can be refiled once the evidence has been retested.

But Adachi's office is arguing that cas-

es based on retested evidence should be dropped, too, because Madden is intertwined in the chain of custody in the case.

"In the alternative," the PD's office argues in a typical motion to dismiss, "defendant requests that the court issue an order compelling the district attorney to comply with her discovery obligations immediately and that the court impose other sanctions as it deems appropriate, including contempt findings and jury instructions regarding the failure to timely produce discovery."

DUBIOUS DEFENSE LAWYERS

Though the scandal seemed to come out of nowhere, defense lawyers say they've long pressed doubts about the lab's procedures in court.

During the Cyrus trial, Philipsborn challenged evidence related to drug weight and purity. "The lab was known to require the barest of documentation both for the calibration of its instrumentation, and that criminalists were going to be relying on paperwork produced under circumstances that were very difficult to pin down," Philipsborn said. "As it happens, after our trial concluded [the American Association of Crime Lab Directors] did its site visit and recommended that the lab be deaccredited. They pointed out the same problem that we were trying to point out."

A jury found Cyrus guilty of three gang-related slayings that took place in San Francisco in 2002.

A spokesman for the U.S. attorney's office said on Friday the government is working on preparing a response to Cyrus' motion but that he had no further comment on what, if anything, the office is doing to handle implications of the crime lab scandal on federal cases.

But in one gang shooting case set for trial April 19, the government on Friday asked Judge Charles Breyer to postpone the trial date because of the looming DNA audit of the crime lab. Though the evidence will be retested at another lab, the motion notes, the government will still need to call witnesses from the lab's DNA section. "It would be unfair to permit defense counsel to question experts from the crime lab about an ongoing audit for which they have no results when the results may well exonerate the DNA analysis unit of the Crime Lab," Assistant U.S. Attorneys William Frentzen and Tarek Helou argued in their motion.

In a separate capital case four years ago, Philipsborn and co-counsel Michael Burt presented testimony about procedures at the crime lab.

"Ironically, they sent, among other people, Deborah Madden to talk about how careful their procedures are," Philipsborn said. "We were trying to explain why, at least in our view, the place was an accident waiting to happen. We didn't make our point clearly enough then, but I think we may be making it now."

Reporter Kate Moser's e-mail address is kmoser@alm.com.

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