## Judges must act to avoid 'Google mistrials'

## Courts poked: tweets not sweet

BY ROBERT TODD Law Times

egional senior justices must immediately issue a practice direction to keep jurors from conducting their own research using new communications tools and avoid havoc recently seen in U.S. courts, says a Toronto criminal defence lawyer.

"What's at stake here is the integrity of the jury trial system, and the foundational notion that an accused has a right to a trial based on the evidence presented in a courtroom before 12 independent, impartial arbiters of the facts," says Toronto criminal defence lawyer Adam Boni.

Lawyers last week reacted to U.S. news reports of what have been dubbed "Google mistrials" — cases in which jurors have been compiling and disseminating information on cases via BlackBerrys and iPhones, contrary to their legal obligations.

Recent incidents include a federal drug trial in Florida in which nine jurors went against a judge's orders and did their own Internet research, an Arkansas civil trial involving a \$12.6-million judgment in which a juror was accused of using Twitter to send updates, and a Pennsylvania political corruption trial in which a juror is accused of posting newsflashes on Facebook and Twitter.

The Florida case was the only incident to lead to a mistrial, but it's clear that ubiquitous new communications tools may be throwing a wrench into established jury rules. However, many of the lawyers *Law Times* spoke with suggest it would be impossible to police and enforce stricter rules, and that it's best to trust that jurors are following court orders.



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But Boni says members of Canada's legal community cannot simply shrug off the issue.

"The apparent problem in the U.S. should be ringing alarm bells in Canadian courtrooms," says Boni, who is a regional director for Toronto with the Criminal Lawyers' Association. "I think this is a classic example of how technological advances can outpace developments in the administration of justice."

Boni says the reports have "taken everybody by surprise," and that lawyers simply assume jurors will follow instructions.

"I think we tend to downplay the impact of this technology on non-lawyers," he says.

"What it demonstrates is that human curiosity and our modern-day addiction to instantaneous information needs to be acknowledged in a very serious way."

If jurors are searching the Internet for news reports that might include excluded evidence, a fundamental right has been jeopardized, says Boni. He says the possible trend could become "corrosive to the right to a fair trial."

Boni says trial judges and lawyers must tackle the issue before it grabs hold in courts here. He suggests the following measures:

- judges and lawyers should discuss specific instructions for jurors during pre-charge conferences, and make clear the prohibition on Internet searches:
- judges must explain to jurors the reasons for the prohibition, including the fact that evidence in a trial is vetted by counsel and the court to ensure credibility, reliability, and fairness; and
- an immediate practice direction should be issued by regional senior justices on how trial judges ought to deal with this issue in the charge to the jury.

Boni says the latter recommendation should lead to the adoption of a uniform code of practice "without delay."

"What we don't want is a patchwork of different See *Behaviour*, page 2

## **Inside This Issue**



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## Quote of the week

"I used to live in Chinatown. I have no doubt that where I used to live would now be deemed contaminated."

Harry Dahme, senior partner,
Gowling Lafleur Henderson LLP
See Rules, page 11