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Lawyers To Execs: Beware Your BlackBerry

By Sara Stefanini

Law360, New York (January 08, 2009) -- While President-elect Barack Obama intends to "scuffle" for the right to keep his BlackBerry, his lawyers' attempts to pry the personal digital assistant from his hands highlight the legal and security risks that high-profile politicians, executives and other public figures run when they talk electronically rather than orally, attorneys say.

E-mail, text messages, instant messages and other electronic forms of communication have quickly become a way of life for both business and personal exchanges, but the growing dependence on them has also highlighted a major pitfall — for better or worse, they are virtually impossible to erase.

"Although such electronic communications seem to be informal and evanescent, in fact they are permanent and indelible and are almost always the subject of discovery requests and data productions in lawsuits and in response to administrative and regulatory inquiries," Anthony Oncidi, chairman of the labor and employment department in the Los Angeles branch of Proskauer Rose LLP, said in an e-mail message sent by BlackBerry.

"In a litigation context, the e-mail will be closely scrutinized — often with a degree of intensity that is completely disproportionate to the amount of care that was used in composing it. All good litigators know that 'e-mail' stands for 'evidence mail,'" Oncidi added.

Obama's struggle to retain his e-mail access once he moves to the White House illustrates the dilemma that executives and other public figures face with regard to their PDAs, mobile phones and other means of communication.

At the moment, the president-elect is still clinging to his BlackBerry. In an interview Tuesday with CNBC, Obama said he needs e-mail access to break free of the White House bubble and continue carrying on unscripted, unfettered conversations with the outside world.

"This is a concern, I should add, not just of the Secret Service, but also lawyers," Obama said of his BlackBerry. "You know, this town's full of lawyers. I don't know if you've noticed ... and they have a lot of opinions. And so I'm still in a scuffle around that, but it — look, it's the hardest thing about being

president.”

So, while the world's growing dependence on e-mail, texts and IMs makes it all the more risky for executives to talk electronically, it also makes it all the more difficult to avoid these electronic conversations, attorneys said.

Still, the leading role that electronic communications have played in several widely watched scandals over the past few years serve as warnings to executives, noted John Thompson, a partner at labor and employment firm Fisher & Phillips LLP.

Former Republican Rep. Mark Foley's downfall, for instance, began with the leaked e-mail and instant messages he sent to teen congressional pages. Allegations that former Detroit Mayor Kwame Kilpatrick had had an extramarital affair, meanwhile, were based on the 14,000-plus intimate text messages he exchanged with another woman.

Although not all executives or high-profile figures are prone to salacious outbreaks such as those involving Foley and Kilpatrick, they could make unintentionally discriminatory comments or inadvertently divulge trade secrets with the click of a button, attorneys said.

“The issue boils down to fact that by communicating electronically, there's a record,” said Rick Bergstrom, co-chairman of the employment and labor group at Morrison & Foerster LLP.

“From the perspective of a senior executive, there's two layers of risks. One would be a typical concern about inappropriate remarks, inappropriate comments, inappropriate e-mails being sent or received, and there can be record of that. The second would be concern about the company's confidential information and access to that confidential information,” Bergstrom said.

The revised Federal Rules of Civil Procedure, allowing for electronic discovery in litigation, have brought these concerns to the forefront over the past two years, attorneys said.

The new rules require organizations to manage their “electronically stored information” so that they can produce it during legal discovery. Electronically stored information applies to any kind of computer-based data, including e-mails, instant messages and conversations over Skype.

“Because of e-discovery, you could create evidence which may not otherwise exist and might not be favorable,” said Randi May, an employment law partner at Hoguet Newman Regal & Kenney LLP.

Bergstrom added, “These days, there's not a case that comes across the desk of any litigator that doesn't involve e-discovery, and many of the most crucial communications or documents end up being e-mail messages. Particularly in the employment arena, as you can imagine, in cases of discrimination or retaliation, the e-mails often become the crucial documents, because it's no longer a he-said-she-said

case.”

As a result, while most executives and public figures will not be pressured to completely forgo their BlackBerrys, as in Obama's case, lawyers are urging their clients to beware of what they type and to save the more sensitive topics for old-fashioned telephone or face-to-face conversations.

“If someone intercepts or gets a hold of whatever e-mailing goes on, it could be politically embarrassing, and I know there's been a fair amount of talk in Washington about the potential pitfalls of communicating via e-mail and text messages,” Thompson said.

Quoting Martin Lomasney, a Massachusetts politician who died in 1933, he added, “Never write if you can speak; never speak if you can nod; never nod if you can wink.”

Bringing Lomasney's advice up to date, former New York Gov. Eliot Spitzer once said, “My only addendum is never put it in an e-mail.”

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