



316 E. 9th St.
Owensboro, KY 42303
1-866-835-0690
Fax: 270-685-6678
www.alcoholtest.com

October 14, 2009

Ms. Laura Barfield
Program Manager
Florida Department of Law Enforcement
2729 Fort Knox Building 2
Suite 1200
Tallahassee, FL 32308

VIA EMAIL AND OVERNIGHT DELIVERY

Re: **Restricted Licenses for Intoxilyzer 8000 Operating Software
Versions 8100.26 and 8100.27**

Dear Ms. Barfield:

It has been brought to the attention of CMI, Inc. the Florida Department of Law Enforcement ("FDLE") intends to schedule a "viewing" of the Intoxilyzer 8000 operating software, versions 8100.26 and 8100.27 (the "Software"), so as to permit members of the criminal defense bar and their experts to view the bit and byte pattern of both versions of the Software. It is also our understanding that this viewing is being conducted in response to the court's decision in *State v. McGratty, et al.*, Case No. 07-AP-38. It remains unclear to CMI how or why it was possible for the trial court to authorize such a viewing in light of the unequivocal language of the Restricted License pursuant to which FDLE has access to the Software. As you know, the Restricted License expressly prohibits such disclosure:

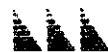
3. CONFIDENTIALITY

If the Licensed Software is identified as being Restricted in any way, the Licensed Software will be treated as a proprietary trade secret of CMI, and Licensee shall hold it in strictest confidence without disclosure to another individual or party during the term, or for twenty (20) years after termination, of this Agreement.

CMI certainly expects that FDLE would have argued to the trial court that such language precludes the disclosure about to take place.

To be clear, CMI considers *any* disclosure of the Software, including the one about to take place, to constitute a serious violation of the Restricted License. CMI's position in this letter should not be construed as a waiver or acquiescence in any future disclosures of the Software. Having said that, CMI appreciates the difficult position that FDLE finds itself in at the present time. As such, and subject to the conditions set forth

INTOXILYZER® ...so you can breathe easier



below, CMI will not take affirmative action on this occasion to prevent the viewing of the Software pursuant to the *McGratty* decision.


FDLE shall take all measures possible to safeguard the confidentiality of the Software during the viewing. No defense lawyer or expert should be permitted to bring into the room where the viewing is to take place any electronic equipment or storage media (CD's, flash drives, digital camera equipment, laptops, etc.), and the viewing must be supervised at all times. Under no circumstances should anyone participating in the viewing be permitted to install any device or software (including, but not limited to, decompilers) on the PC to be used for the viewing.

Notwithstanding the above-stated position and immediately upon the conclusion of the forthcoming viewing of the Software, CMI will declare a breach of the Restricted License associated with version 8100.26 of the Software and will terminate the Restricted License. FDLE is to return *all* materials related to version 8100.26 of the Software, including but not limited to, any manuals, disks, copies or other documentation. Any copies of version 8100.26 of the Software that may exist in FDLE computers or data storage devices shall be immediately and permanently deleted.

CMI would request that in the future it be informed of any efforts by any party to obtain access to the Software with sufficient time to allow CMI to take appropriate steps to protect its proprietary information and assets. CMI does not wish to learn about the disclosure requests after an appellate court has already rendered a decision adversely affecting CMI's interests. At a minimum, CMI would expect that FDLE and its representatives, in accordance with FDLE's contractual obligations, would affirmatively argue against the disclosure of the Software, citing the explicit language of the Restricted License associated with version 8100.27 of the Software.

CMI does not take this position lightly or without considerable deliberation as to its effects on FDLE. CMI has always enjoyed and valued its close working relationship with FDLE and other law enforcement agencies in Florida. We simply ask that there be a heightened sensitivity to the important confidentiality interests associated with use of the Software. Should you or anyone at FDLE have any questions regarding this matter, please do not hesitate to contact us.

Sincerely,



Toby S. Hall
President

Cc: Linton Eason, Esq. (via email)
Allen Holbrook, Esq. (via email)
Edward G. Guedes, Esq. (via email)



316 E. 9th St.
Owensboro, KY 42303
1-866-835-0690
Fax: 270-685-8678
www.alcoholtest.com

RECEIVED

OCT 15 2009

FDLE
Alcohol Testing Program

October 14, 2009

Ms. Laura Barfield
Program Manager
Florida Department of Law Enforcement
2729 Fort Knox Building 2
Suite 1200
Tallahassee, FL 32308

VIA EMAIL AND OVERNIGHT DELIVERY

Re: **Restricted Licenses for Intoxilyzer 8000 Operating Software
Versions 8100.26 and 8100.27**

Dear Ms. Barfield:

It has been brought to the attention of CMI, Inc. the Florida Department of Law Enforcement ("FDLE") intends to schedule a "viewing" of the Intoxilyzer 8000 operating software, versions 8100.26 and 8100.27 (the "Software"), so as to permit members of the criminal defense bar and their experts to view the bit and byte pattern of both versions of the Software. It is also our understanding that this viewing is being conducted in response to the court's decision in *State v. McGratty, et al.*, Case No. 07-AP-38. It remains unclear to CMI how or why it was possible for the trial court to authorize such a viewing in light of the unequivocal language of the Restricted License pursuant to which FDLE has access to the Software. As you know, the Restricted License expressly prohibits such disclosure:

3. CONFIDENTIALITY

If the Licensed Software is identified as being Restricted in any way, the Licensed Software will be treated as a proprietary trade secret of CMI, and Licensee shall hold it in strictest confidence without disclosure to another individual or party during the term, or for twenty (20) years after termination, of this Agreement.

CMI certainly expects that FDLE would have argued to the trial court that such language precludes the disclosure about to take place.

To be clear, CMI considers any disclosure of the Software, including the one about to take place, to constitute a serious violation of the Restricted License. CMI's position in this letter should not be construed as a waiver or acquiescence in any future disclosures of the Software. Having said that, CMI appreciates the difficult position that FDLE finds itself in at the present time. As such, and subject to the conditions set forth

INTOXILYZER® ...so you can breathe easier



below, CMI will not take affirmative action on this occasion to prevent the viewing of the Software pursuant to the *McGratty* decision.


FDLE shall take all measures possible to safeguard the confidentiality of the Software during the viewing. No defense lawyer or expert should be permitted to bring into the room where the viewing is to take place any electronic equipment or storage media (CD's, flash drives, digital camera equipment, laptops, etc.), and the viewing must be supervised at all times. Under no circumstances should anyone participating in the viewing be permitted to install any device or software (including, but not limited to, decompilers) on the PC to be used for the viewing.

Notwithstanding the above-stated position and immediately upon the conclusion of the forthcoming viewing of the Software, CMI will declare a breach of the Restricted License associated with version 8100.26 of the Software and will terminate the Restricted License. FDLE is to return *all* materials related to version 8100.26 of the Software, including but not limited to, any manuals, disks, copies or other documentation. Any copies of version 8100.26 of the Software that may exist in FDLE computers or data storage devices shall be immediately and permanently deleted.

CMI would request that in the future it be informed of any efforts by any party to obtain access to the Software with sufficient time to allow CMI to take appropriate steps to protect its proprietary information and assets. CMI does not wish to learn about the disclosure requests after an appellate court has already rendered a decision adversely affecting CMI's interests. At a minimum, CMI would expect that FDLE and its representatives, in accordance with FDLE's contractual obligations, would affirmatively argue against the disclosure of the Software, citing the explicit language of the Restricted License associated with version 8100.27 of the Software.

CMI does not take this position lightly or without considerable deliberation as to its effects on FDLE. CMI has always enjoyed and valued its close working relationship with FDLE and other law enforcement agencies in Florida. We simply ask that there be a heightened sensitivity to the important confidentiality interests associated with use of the Software. Should you or anyone at FDLE have any questions regarding this matter, please do not hesitate to contact us.

Sincerely,



Toby S. Hall
President

Cc: Linton Eason, Esq. (via email)
Allen Holbrook, Esq. (via email)
Edward G. Guedes, Esq. (via email)

Barfield, Laura

From: Edward G. Guedes [EGuedes@wsh-law.com]
Sent: Tuesday, April 06, 2010 12:38 PM
To: Barfield, Laura; Eason, Linton
Subject: FW: CMI Response re Production Of Software Disk for Version 8100.27
Importance: High
Attachments: Letter to FDLE Re Production Of Software Disk 4-6-10.pdf

My apologies. I neglected to attach the letter!

Ed



Edward G. Guedes
Partner
Board Certified in Appellate Practice
Weiss Serota Helfman Pastoriza Cole & Boniske, P.L.
2525 Ponce de Leon Blvd., Suite 700
Coral Gables, FL 33134
www.wsh-law.com
Tel: (305) 854-0800
Fax: (305) 854-2323

 **Think before you print**

This message, together with any attachments, is intended only for the addressee. It may contain information which is legally privileged, confidential and exempt from disclosure. If you are not the intended recipient, you are hereby notified that any disclosure, copying, distribution, use, or any action or reliance on this communication is strictly prohibited. If you have received this e-mail in error, please notify the sender immediately by telephone (305) 854-0800 or by return e-mail and delete the message, along with any attachments.

From: Edward G. Guedes
Sent: Tuesday, April 06, 2010 11:57 AM
To: 'Barfield, Laura'; Eason, Linton
Cc: Cliff Ramey
Subject: CMI Response re Production Of Software Disk for Version 8100.27
Importance: High

Dear Laura and Linton,

Attached is CMI's response regarding the *Nesbitt* court's order directed to the State to turn over the software disk for version 8100.27 of the I-8000. The original should follow by overnight mail. Should you have any questions, please don't hesitate to contact me.

Regards,

Ed

4/6/2010



316 E. 9th St.
Owensboro, KY 42303
1-866-835-0690
Fax: 270-685-6678
www.alcoholtest.com

VIA OVERNIGHT DELIVERY

Ms. Laura Barfield, Program Manager
Florida Department of Law Enforcement
P.O. Box 1489
Tallahassee, FL 32302

Re: Restricted Licenses for Intoxilyzer 8000 Operating Software Version 8100.27

Dear Ms. Barfield:

It has been brought to the attention of CMI, Inc., the owner of the operating software installed in the Intoxilyzer 8000 (the "Software"), that the State of Florida – and by extension, the Florida Department of Law Enforcement ("FDLE") – has been directed by the Sarasota County Court in *State v. Nesbitt, et al.*, Case No. 2009 CT 1276 NC (as well as in other consolidated cases) to turn over the disk containing Software version 8100.27 to the defendants' counsel and experts in those cases. It remains unclear to CMI how or why it was possible for the trial court to authorize such disclosure in light of the unequivocal language of the Restricted License pursuant to which FDLE has access to the Software. As you know, the Restricted License expressly prohibits such disclosure:

3. CONFIDENTIALITY

If the Licensed Software is identified as being Restricted in any way, the Licensed Software will be treated as a proprietary trade secret of CMI, and Licensee shall hold it in strictest confidence without disclosure to another individual or party during the term, or for twenty (20) years after termination, of this Agreement.

CMI certainly expects that the State would have argued to the trial court that such language precludes the disclosure about to take place.

To be clear, CMI considers *any* disclosure of the Software, including the one about to take place, to constitute a serious violation of the Restricted License. CMI's position in this letter should not be construed as a waiver or acquiescence in any future disclosures of the Software. Having said that, CMI appreciates the difficult position that FDLE finds itself in at the present time. Moreover, it does not appear to CMI that access to the Software disk for version 8100.27 risks the disclosure of CMI's confidential or proprietary information. As such, and subject to the conditions set forth below,

INTOXILYZER® ...so you can breathe easier



Ms. Laura Barfield

Page 2 of 2

CMI will not take affirmative action on this occasion to prevent the disclosure of the Software disk for version 8100.27, pursuant to the *Nesbitt* decision. However, CMI reserves the right to reconsider its position should any further requests be made with respect to production of the Software.

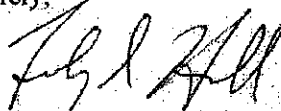
Moreover, in light of the fact that the production at issue constitutes a breach of the Restricted License, we are requesting that FDLE return to CMI all disks or materials currently in the possession of FDLE relating to any other version of the Software. Because version 8100.27 is currently being used in Florida instruments, our foregoing request for a return of CMI's proprietary materials does *not* extend to version 8100.27.

With respect to the production of the disk for version 8100.27, FDLE shall take all measures possible to safeguard the confidentiality of the Software, including enforcing the restrictions imposed by the trial court in connection with the production of the disk. Any and all materials provided by FDLE to defendants' counsel or experts should be recovered at the conclusion of their examination of the disk. The examination of the disk should be supervised, if at all possible, by a representative of FDLE or the State Attorney's office in Sarasota County. Under no circumstances should anyone participating in the examination be permitted to copy or reproduce disk or its contents in any way.

In the future, CMI would expect that FDLE and the State, in accordance with FDLE's contractual obligations, would affirmatively argue against the disclosure of the Software, citing the explicit language of the Restricted License associated with version 8100.27 of the Software. This vigorous defense should include appellate review of any order requiring disclosure of the Software.

CMI does not take this position lightly or without considerable deliberation as to its effects on FDLE or the State of Florida. CMI has always enjoyed and valued its close working relationship with FDLE and other law enforcement agencies in Florida. We simply ask that there be a heightened sensitivity to the important confidentiality interests associated with use of the Software. Should you or anyone at FDLE have any questions regarding this matter, please do not hesitate to contact us.

Sincerely,



Toby S. Hall
President

Cc: Linton Eason, Esq.
Cliff Ramey, Esq.
Allen Holbrook, Esq.
Edward G. Guedes, Esq.