

Lawyer: Intoxilyzer source code available in Kentucky

By EDWARD GUEDES
Guest Columnist

For months, CMI Inc., the manufacturer of the Intoxilyzer breath-alcohol testing instrument used in Florida, has remained silent as newspaper articles have purported to represent CMI's position regarding disclosure of certain sensitive and proprietary intellectual property associated with the Intoxilyzer. Most of these articles have made a number of incorrect assumptions about CMI's concerns regarding disclosure of the Intoxilyzer source code. CMI has remained silent to date because of ongoing litigation issues it believes are inappropriately tried in the press. Unfortunately, an article, editorial and column published in the Herald-Tribune on May 10, 11, and 12, respectively, have necessitated CMI's response.

The article by Todd Ruger insinuates that CMI's alleged efforts to "prevent" the disclosure of the Intoxilyzer source code have resulted in the state's dropping criminal charges against someone Mr. Ruger describes as "one of the area's most infamous repeat drunken drivers."

This insinuation, however, is founded on a series of mistaken assumptions regarding CMI.

For more than a year, CMI has repeatedly offered to make the Intoxilyzer source code available for comprehensive forensic examination at CMI's facilities in Kentucky, just as it recently did to facilitate an examination of the source code for the Intoxilyzer model used in Minnesota. These offers are a matter of public record, as reflected in motions filed by CMI in cases pending around the state.

The editorial mischaracterizes CMI's offer as an "attempt to dictate the terms under which \ might comply with court orders." CMI has sought nothing more than entry of an appropriate protective order — the same mechanism the editorial concedes would preserve the source code's confidentiality — as a prelude to the examination.

To date, no defense attorney has voluntarily accepted CMI's invitation to examine the source code. In contrast, the defense attorneys in the Minnesota litigation availed themselves of the opportunity and examined the source code in Kentucky, at the conclusion of which the Minnesota court essentially determined that the Intoxilyzer source code functioned properly.

In addition to offering to make the source code available for inspection in its native electronic format in Kentucky, CMI has already produced the source code in written format in multiple cases in Clay County, and has with court approval agreed to do likewise in Duval and Nassau counties. CMI's written source code, which is the subject of court-issued protective orders, has sat unexamined in the sheriff's office in Clay County for weeks, the cases for which it was produced having now been concluded.

After months of CMI efforts, Seminole Circuit Judge Marlene Alva in March ordered that the source code be examined in Kentucky. Since then, CMI and its lawyers have been cooperating with defense counsel in that case and have scheduled an examination by the very same expert used by defense counsel in Sarasota and Manatee counties. Despite their knowledge of the impending examination of the source code, no defense attorney in either county has made an effort to coordinate with CMI's lawyers to participate in the examination. To this day, CMI continues to cooperate with the state attorney's office in both counties to encourage defense participation in the upcoming examination or to arrange production of the written source code.

To be clear, Mr. Ruger's unqualified statement that "the manufacturer refuses to turn \ over" — echoed in Tom Lyons' later column — is mistaken. The court records in dozens of cases around the state belie that assertion. The source code is available for examination subject only to certain standard protections intended to safeguard both CMI's valuable corporate asset and the integrity of the state's breath-alcohol testing program.

CMI cannot remain silent when the suggestion is made that it has contributed to the dropping of charges against a repeat drunken-driving offender. CMI has for years worked closely with law enforcement and state prosecutors throughout the state to ensure precisely the opposite and to provide a reliable product that would assist law enforcement in its efforts to protect Floridians from the dire consequences of drunken driving.

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