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**FLORIDA SUPREME COURT** Justices limit powers of state judges

## DUI defense attorneys lose subpoena bid

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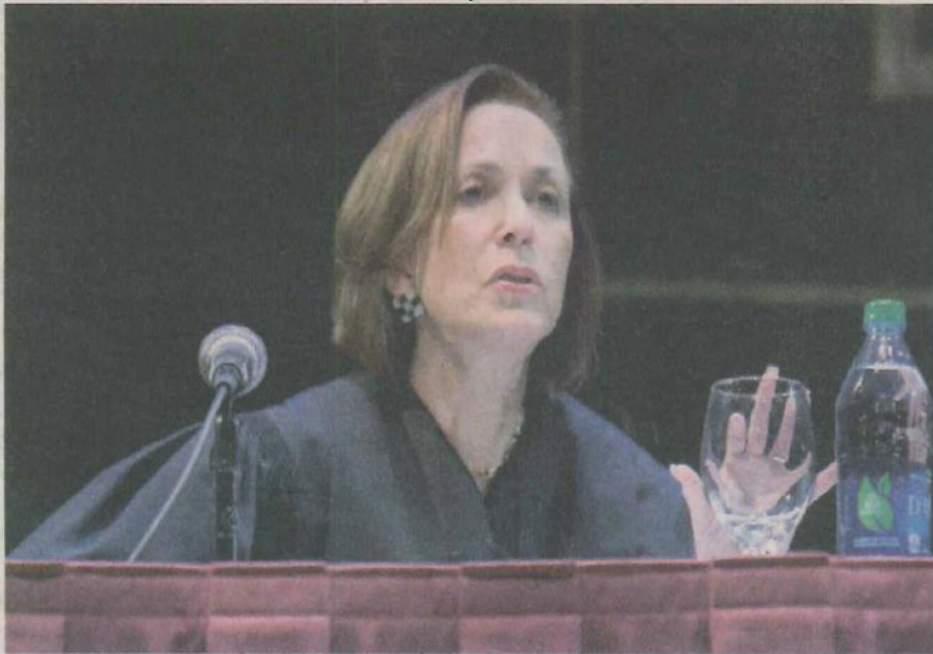
Drunken-driving defense attorneys have one fewer arrow in their quivers.

In a case that took five years to litigate, the Florida Supreme Court said a Kentucky-based manufacturer of a breathalyzer device doesn't have to provide source code for its product based on a subpoena by drunken-driving defendants without a reciprocal hearing in its own state.

The opinion by Justice Barbara Pariente places limits on the power of state judges to order out-of-state defendants to produce evidence and witnesses.

Attorney Edward G. Guedes,

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# SUBPOENA: Drunken-driving defendants lose legal options

a partner at Weiss Serota Helfman Pastoriza Cole & Boniske in Coral Gables, represented Owensboro, Ky.-based CMI Inc. He said hundreds of DUI defendants have been requesting CMI's source code.

"Defendants around the state were using this tactic, and there was a coordinated effort by the criminal defense bar," Guedes said. "It's my view that a great many DUI defendants were doing this to simply delay their cases and strong arm assistant state attorneys."

The source code is a readable set of instructions to programmers that is converted to binary code for a computer chip to read. "For CMI, it was in fact its most valuable asset," Guedes said. "If somebody else got their source code, they could reproduce their product."

Venice attorney Robert Harrison argued for the subpoena on behalf of a Seminole County DUI defendant before the Florida Supreme Court. He did not return a call for comment by deadline.

Guedes said DUI defense attorneys started asking in Florida courts for the source code rather than travel to Kentucky to get testimony from CMI officials on the device that measures blood-alcohol content by analyzing a person's breath.

Judges all over Florida ordered CMI to produce the code without a reciprocal hearing in Kentucky.

Drunken-driving defendants argued that even though CMI had no offices or employees in Florida, it used a registered agent that served thousands of out-of-state businesses, making it accountable to turn over its intellectual property. The DUI defendants petitioned trial court for a certificate of materiality, arguing the source code was witness materials necessary for the criminal defense.

"Our contention is there is no difference compelling a witness to appear and in turning over valuable corporate

assets," Guedes said.

## CONFLICTING DECISIONS

Fighting the petitions was expensive for CMI. He said, "We had hearing after hearing, running around the state."

The Second District Court of Appeal in Lakeland sided with the trial judges in decisions ordering CMI to turn over the source code, citing a lack of case law on the subject.

The Fifth District Court of Appeal in Daytona Beach held subpoenaing CMI's registered agent was insufficient to compel CMI to produce the source codes.

The certified conflict allowed the Florida Supreme Court to consider the issue.

Pariante in the unanimous 25-page opinion Thursday agreed with the latter, finding drunken-driving defendants must adhere to the uniform law to secure the attendance of out-of-state witnesses in criminal proceedings, which calls for hearings in both Florida and the jurisdiction of the out-of-state business.

"Subpoena power to compel the production of out-of-state documents belonging to out-of-state nonparty witnesses in a criminal case derives from the same source as the power to compel the attendance of out-of-state nonparty witnesses," she wrote.

Guedes said the decision protects Florida businesses as well because out-of-state jurisdictions could see how Florida judges were handling the subpoena requests.

"What if Carnival or some other corporation in Florida that happens to do business in Alabama or Kentucky got subpoenaed," he said. "The courts in those states could look at Florida state law and say, 'Florida has a uniform law, but it doesn't enforce it.'"

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