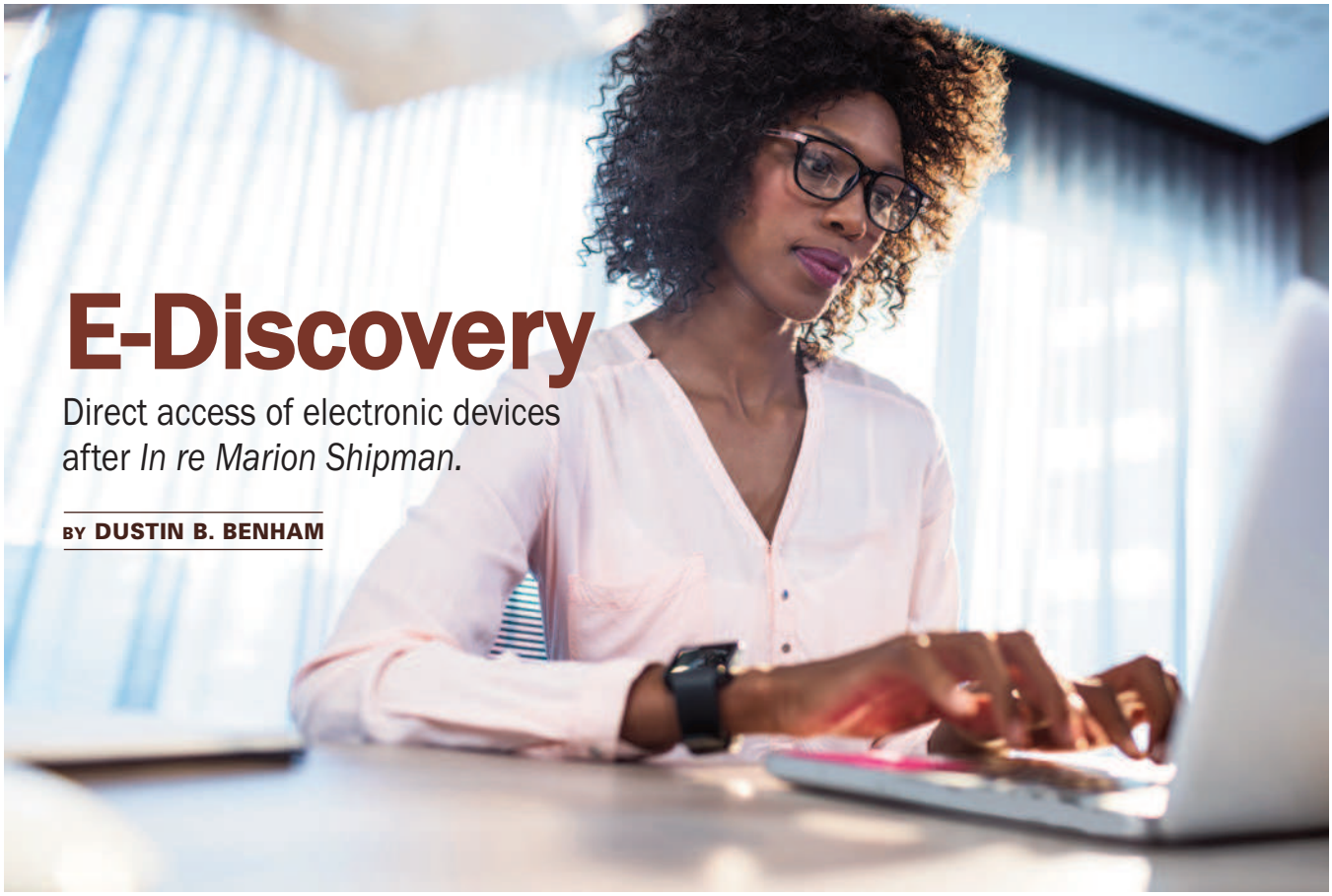

E-Discovery

Direct access of electronic devices after *In re Marion Shipman.*

BY **DUSTIN B. BENHAM**

How do you persuade a court to give your client direct access to an opponent's electronic devices during discovery? Direct access allows a litigant's own forensic expert to make an image of all data on an opponent's device. Afterward, the expert can independently search for responsive material, seek to recover damaged or deleted files, or both.

The Texas Supreme Court recently revisited the direct-access question in *In re Marion Shipman*,[1] nine years after its seminal decision on the same topic in *In re Weekley Homes*.[2] Electronic discovery, once a critical issue mainly in cases involving large organizations, is now a critical part of every case. Even small businesses rely on mobile, networked, and cloud-based systems for every aspect of operations. And most people carry electronic devices on their person at virtually all times and have many computing and storage devices at home.

The Basic Direct-Access Discovery Framework

Understandably, companies and individuals hesitate to give an adverse litigant direct access. The Supreme Court has recognized the sensitivity surrounding the issue: "Providing access to information by ordering examination of a party's electronic storage device is particularly intrusive and should be generally discouraged, just as permitting open access to a party's file cabinets for general perusal would be."[3] This preference in favor of the responding party conducting searches of its own devices prevails unless the requesting party makes a specific evidentiary showing.

First, a litigant requesting device access must establish that the responding party defaulted in its discovery obligations.[4] After that threshold showing, the requesting party must demonstrate that the responsive information exists on the target device and that the proposed access protocol will retrieve it. Courts conduct this analysis under the broader requirement that the benefits of the proposed protocol and resulting discovery outweigh the burdens.

A New Look at the Direct-Access Question in *In re Shipman*

In *Shipman*, the Supreme Court applied the *Weekley* direct-access test in a new context and gave some helpful, if indirect, clues for those hoping to prevail on the issue in lower courts.

The Shipman *Discovery Dispute*

The dispute in *Shipman* arose from an allegedly incomplete production of electronically stored financial documents in a business fraud lawsuit. Jamie Shelton sent several requests for production to Marion Shipman, and although Shipman produced some documents, Shelton remained convinced that Shipman's production was incomplete. Following a successful motion to compel by Shelton, Shipman was deposed and testified that his old computer (containing relevant documents) had "crashed" before the initiation of the lawsuit.[5] As a result, Shipman had been unable to retrieve relevant information from the device.

Shipman's Late Production

Several days after the deposition, Shipman provided, with his son's help, additional responsive documents from a backup

folder on a working device to Shelton on a thumb drive. Shipman and his attorney provided affidavits, swearing that they had diligently searched all functioning devices and produced all responsive documents.

Allegations of Default

Following the late production, Shelton filed a second motion to compel, alleging that Shipman had defaulted in his discovery obligations and asking the court to allow a forensic examiner direct access to Shipman's devices. According to the examiner's testimony, this approach could yield usable evidence, even from the non-functioning device. The court granted the motion and ordered a direct-access protocol for a broad swath of devices and media from "January 1, 2000 through the present."[6] The court of appeals denied mandamus, and the Supreme Court took up the case.

Building on the Weekley *Framework*

This *Shipman* court focused on the first prong of the direct-access inquiry: whether Shipman, the responding party, had defaulted in his discovery obligations. Reiterating that a party requesting direct access to another party's electronic devices must provide more than "mere skepticism or bare allegations," the court examined evidence of Shipman's discovery conduct.

The gist of the requesting party's allegations of default was that Shipman lacked the expertise to search his own devices, particularly the crashed computer. The allegations were backed up by evidence of the post-deposition production of documents from the backup folder (obtained with help from his son) and Shipman's own equivocal testimony about the completeness of the production.

At the outset, the court noted that the late discovery of the backup folder and late production have some bearing on Shipman's ability to search his devices. But it ultimately found that the evidence supported "mere skepticism" that more documents existed and that Shipman defaulted on his discovery obligations.[7] Rather, the court found that the late search and prompt production were evidence that he made an "effort to comply" rather than default.[8] To hold otherwise, the court noted, would create a "perverse incentive" to withhold late-discovered documents in an attempt to avoid forensic device inspection.[9]

The court also found that Shipman's equivocal deposition testimony about the state of the document production was more "general skepticism" about a discovery default.[10] Instead of focusing on the original testimony, the court looked to Shipman's later, unequivocal affidavit that he had produced all responsive information. Based on those representations, the court held that Shipman's conduct did not amount to a discovery default and conditionally granted mandamus to vacate the trial court's direct-access order.

How Does a Requesting Party Obtain Direct Forensic Device Access Post-*Shipman*?

Under the *Weekley-Shipman* framework, what must a requesting party prove to gain direct access to another party's devices? The *Shipman* court explicitly noted that it "[did] not suggest that a requesting party can never establish a discovery-obligation default under *Weekley* by offering evidence of a producing party's ineptitude."[11] But evidence of inconsistencies in document productions and proof of documents that might be missing are not enough.

By considering the rationales and holdings of *Weekley* and *Shipman*, however, we can imagine evidence that might rise above "mere skepticism" and support direct access.

The Efforts and Technical Capacity of the Responding Party

According to the *Shipman* court, testimony about Shipman's technical ability to search for the files at issue was "notably absent."[12] Indeed, "Shipman was neither pressed at his deposition nor examined at the motion-to-compel hearing concerning his computer skills or the specific steps he took to search his computer."[13]

To establish a discovery default, then, the requesting party should elicit specific, unequivocal testimony from the responding party about the steps taken (or more importantly, not taken) to retrieve the requested information. If part of the basis of the access request is that the responding party lacks the technical expertise to retrieve the information, then the examination should focus on specific technical limitations of that party that would prevent successful retrieval.

Don't Forget the Efforts and Capabilities of Employees and Agents

Because of the record's silence on Shipman's son's specific technical capabilities, the court found that the evidence was at best equivocal because, with his son's assistance, Shipman claimed to have provided all responsive information.

So it would follow that a party seeking device access should carefully explore the efforts and capabilities of all involved employees and agents of the responding party. Then the party should elicit testimony that shows the specific lack of effort or technical ability for each involved employee and agent, including third-party discovery providers.

Existence of the Documents

Testimony establishing a default, like failure to search for relevant electronic information, does not (by itself) establish that the information sought exists.[14] A requesting party should go further and establish that a search would "likely reveal" the information sought.[15] The *Weekley* court found that conclusory allegations that such documents "must exist" are insufficient.[16]

It may prove difficult in practice, however, to prove the existence of something to which the requesting party does not yet have access and for which no one has yet searched. The key here is to question specific custodians, or persons with knowledge of the IT infrastructure of the responding party, to establish that a specific category of information exists at (or was deleted from) a specific device location.

Evidence That the Direct-Access Protocol Will Succeed

Assuming the requesting party establishes the existence of the pertinent information, it still needs to establish that its data expert will succeed in obtaining the information. Imagine, for instance, a situation like *Shipman*, where a requesting party

seeks direct access to a crashed device.

That party needs to establish, likely through expert testimony or affidavit, that there is a reasonable likelihood that accessing the specific crashed device in the way proposed will yield the information sought. For deleted information, the requesting party needs to prove that recovering the specific deleted information is likely.

Scope of the Direct-Access Order

In *Shipman*, the contested order was impermissibly broad—it provided direct access to every device in the responding party's possession for a period of more than 15 years. Therefore, a requesting party would be wise to limit the breadth of any direct-access order. There are several ways to do this, including limiting the number of devices to be examined, limiting the search timeframe, using search terms to limit files accessed, or proposing a joint inspection protocol that would allow both sides' experts to participate and minimize intrusion.

Conclusion

Remember, these suggestions are made against the rules' prohibition on discovery where "the burden or expense of discovery outweighs its likely benefit."[17] Therefore, in addition to the specific proof above, a wise practitioner would also consider carefully how direct access advances the issues in the case, along with the costs of production to the responding party. **TBJ**

Thanks to David Coale for his thoughtful comments on this article.

Notes

1. 540 S.W.3d 562 (Tex. 2018).
2. 295 S.W.3d 309 (Tex. 2009).
3. *Shipman* at 566 (quoting *Weekley* at 317).
4. *See Weekley* at 317.
5. *See Shipman* at 564.
6. *Id* at 565.
7. *Id.* at 568-69.
8. *Id.* at 568.
9. *Id.*
10. *Id. at* 569.
11. *Id.*
12. *Id.*
13. *Id.*
14. *See Weekley* at 319-20.
15. *Id.* at 320.
16. *Id.*
17. *See* Tex. R. Civ. P. 192.4.

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