ALM | LAW.COM

New York Law Journal

Technology Today

FEDERAL E-DISCOVERY

Clone Discovery Must Meet Relevance, Proportionality, Particularity Requirements

By H. Christopher Boehning and Daniel J. Toal

June 4, 2024

Regardless of what you call them—clone, copycat, flipped—the request is the same: to re-produce document productions from a prior matter to a different party in a new, related matter. Often, the presumption is one of relative ease—just produce what you did before. Such requests, though, often disregard both the potential procedural complexity of clone discovery and the relevance, proportionality and particularity requirements of discovery under the Federal Rules of Civil Procedure.

Despite the ubiquity of requests for clone discovery, few cases confront their complexity and analyze the issues involved. But a recent decision changes that. In *United States v. Anthem,* 2024 WL 1116276 (S.D.N.Y. Mar. 13, 2024), the court explored the various challenges presented in clone discovery and ultimately offered a middle-ground approach that balances the burdens and benefits of sharing such data.

'United States v. Anthem'

In Anthem, the government brought an action against health insurance company Anthem under the False Claims Act. The government alleged that fraud relating to the costs of delivering Medicare-covered services resulted in the government overpaying Anthem by millions of dollars.

Christopher Boehning

Daniel J. Toal

In discovery, Anthem served a number of requests for production (RFPs) on the government. RFP 1 sought clone discovery. It asked the government to "re-produce discovery previously produced in another litigation —*United States ex rel. Poehling v. UnitedHealth Group (Poehling)*—involving similar claims against one of Anthem's competitors, UnitedHealthcare." The "approximately 3 million documents" produced in the *Poehling* litigation included "[s]ome custodians who are relevant to the instant action." Moreover, many of the search terms used in that matter "would collect many of the documents requested in Anthem's [other] RFPs."

The court, aware of the "overlap of information needed in this action and the information produced in *Poehling*," had "previously directed the government

H. CHRISTOPHER BOEHNING *and* DANIEL J. TOAL *are litigation partners at Paul, Weiss, Rifkind, Wharton & Garrison.* ROSS M. GOTLER, *deputy chair and counsel, e-discovery, and* LIDIA M. KEKIS, *e-discovery attorney, assisted in the preparation of this article.*

to produce certain documents from the *Poehling* litigation to allow the parties to benefit from work done in Poehling and tailor discovery in this action to information that was specific to Anthem and not redundant of key information that could be learned from *Poehling*." The government complied and "produced 55,000 documents produced in *Poehling*, 49 deposition transcripts with their corresponding 572 exhibits."

The court noted that with this production, "Anthem has received a substantial set of core documents and testimony relevant to this case already. Further, it has benefited substantially from the work of the attorneys' in *Poehling* who had to sift through a massive data set to locate the most important documents and testimony relevant to the claims in that case, many of which will likely be the most important documents in this case[.]"

Under Rule 34, RFPs "must describe with reasonable particularity each item or category of items requested."

After receiving this set of the *Poehling* documents, Anthem nonetheless continued to request clone discovery of the majority of documents that the government had produced in *Poehling*. Anthem, though, "narrowed RFP 1 to seek 2.2 million additional documents produced in *Poehling* from 40 custodians out of the total 187 custodians." Anthem also agreed that, if granted this discovery, it would "not seek any additional documents from these 40 custodians" and "would only seek additional documents from up to 25 other custodians" for other RFPs.

In pursuing this discovery, Anthem argued that it was entitled to the documents since they "are relevant and…there is no burden to the government because it can simply reproduce the production it produced in *Poehling*."

The government, objecting to the clone discovery, argued that the *Poehling* production contained "many irrelevant documents" along with privileged documents it had produced only after losing a decision in that matter. As an alternative, the government offered "to apply search terms to the *Poehling* documents and to an even broader set of custodians to look for documents specific to this case and responsive to Anthem's non-*Poehling* RFPs."

Anthem moved to compel the clone discovery.

The Court's Analysis

The court began its analysis by stating that when "considering any motion to compel, the court first turns to Federal Rule of Civil Procedure 26(b), which specifies the scope of discovery." Under this rule, the allowable scope of discovery is "any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case." The court emphasized that under Rule 26, it "may deny discovery of relevant information if it is not proportional to the needs of the case."

Additionally, under Rule 34, RFPs "must describe with reasonable particularity each item or category of items requested."

The court underscored that, "Rule 26(g) requires that lawyers who serve RFPs must certify that the request is…neither unreasonable nor unduly burdensome or expensive, considering…*prior discovery in the case,* the amount in controversy, and the importance of the issues at stake in the action."

Quoting a document published by leading discovery think tank The Sedona Conference, the court wrote that the drafters of the 2015 amendments to the Federal Rules "sought to reduce costs and burdens of discovery and, with respect to Rule 34, prohibit 'overly broad, non-particularized discovery requests that reflexively sought all documents.'"

The court added that it "fully endorses" a "best practice tip" provided in this Sedona Conference document, "that requesting parties should tailor their requests to minimize objections and facilitate substantive responses."

Turning to the specific issue of requests to reproduce prior productions, the court explained that "numerous courts have found that requests for 'all' documents produced in another litigation, so-called 'clone' [or] 'copycat' discovery, are inherently overbroad requests requiring the court to considerably scale back the information that a producing party must produce from another litigation or deny it entirely on the ground that a party must do its own work."

After citing a number of prior decisions on the topic, the court determined, "[u]ltimately, 'the appropriateness of cloned discovery depends upon the circumstances' of each case."

A Middle Approach

In partially granting and partially denying Anthem's motion to compel the clone discovery, the court took "a middle approach that it believes is consistent with [the Federal Rules], minimizes the burdens on both parties and capitalizes on the work already done by the parties in Poehling."

Courts should be mindful of the burdens and costs involved in searching and modifying a prior production and how that may impact proportionality considerations

Specifically, the court directed the government to start with the 2.2 million *Poehling* documents requested by Anthem and to narrow the population by applying "date restrictions to each of the 40 custodians for the time period the custodians were employed in roles where they were involved in issues relevant to this case," removing documents that were generated after 2018 and thus outside the relevant time frame, eliminating documents on two irrelevant topics noted by the government, and withholding (but logging) any documents that the government had originally marked as subject to the deliberative process privilege.

Moreover, "in light of the fact that the additional documents from *Poehling* will provide substantial additional information about non-Anthem specific policies and procedures," the court significantly limited the government's required responses to Anthem's other RFPs and required that Anthem "show good cause to propound any additional RFPs."

Clone Discovery

In Anthem, the defendant looked to benefit from prior discovery by asking for a reproduction of a massive set of documents, and claimed this discovery should be granted since such clone discovery entailed no burden to the plaintiff.

Clone discovery, though, like all discovery, can be complex. There may be no "easy button" to automatically re-produce—especially with new Bates and confidentiality stamping—what may have originally been a complicated, difficult process to review and produce a massive set of documents under significant time constraints. Some factors often at play with such productions are clawbacks, overlays, last-minute manual changes, subsequently redacted documents, privacy considerations and compliance with protective or confidentiality orders.

And, in all events, the relative ease of reproducing a "clone" or "flip" production is not dispositive. It is just one factor for a court to consider as it determines whether the requested clone discovery, like any federal discovery, is allowable under the Federal Rules of Civil Procedure given its requirements of relevance, proportionality, and particularity. For example, as in Anthem, the clone discovery may be overbroad, containing irrelevant materials to which the requesting party is not entitled. Compelling production of such items may run afoul of the rules.

Courts also should be mindful of the burdens and costs involved in searching and modifying a prior production and how that may impact proportionality considerations.

In her ruling, Magistrate Judge Katharine Parker does just that, extending her line of decisions where she applies balanced, nuanced analysis when considering challenging discovery topics. In Anthem, she establishes guardrails for requests for clone discovery, rejecting any notion that it should be the default or that it is without burden.

That said, as in *Anthem*, there may be significant benefits from clone discovery, potentially reducing the overall burdens and costs of discovery for a current matter. In the end, as Parker found, courts may assess requests for clone discovery on a case-by-case basis, with a thoughtful analysis of the applicable Federal Rules and all of the obligations and protections therein.