

In The News

James E. Rogers Guides Texas Litigators Through the Emerging Framework for AI and Privilege in *Texas Lawyer*

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Akerman Litigation Practice Group Partner James E. Rogers contributed “AI and Privilege: What Texas Litigators Need to Know” to *Texas Lawyer*, examining how recent federal and state court decisions have begun to clarify the central privilege question posed by client use of AI tools in litigation.

James explains that courts have been divided over a foundational question: when a client uses an AI tool in connection with litigation, does that use amount to disclosure to a third party that could waive privilege, or is it simply use of a research tool that leaves privilege intact? In *United States v. Heppner*, a federal court came down firmly on the side of disclosure, finding that no privilege attached to materials fed into a consumer AI tool whose terms of service authorized third-party access, and that sharing those materials with counsel afterward could not retroactively restore it.

Three subsequent rulings pushed back. In *Warner v. Gilbarco* and *Morgan v. V2X*, federal courts held that generative AI platforms are tools rather than third parties, declining to order production of AI-generated work product. The recently decided *Tate Group Automotive* brought that majority view to Texas for the first time, with the Texas Business Court protecting a non-lawyer’s AI-assisted work product from production and giving Texas

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practitioners their first authoritative guidance on the issue.

James advises Texas practitioners to ensure clients use publicly available AI tools under counsel's supervision and through platforms with meaningful confidentiality protections. He also recommends revisiting standard engagement letters and litigation hold notices to address client AI usage, steps that the growing weight of authority makes increasingly difficult to defer.

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