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What is Persuasive Authority and When Does it Stop Being Persuasive?

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I. Introduction

Courts must follow some legal principles because they are "controlling" or "binding" authority — such as when those principles are announced by a higher court to which lower-ranking courts must defer under *stare decisis*. *See, e.g., Swilley v. McCain*, 374 S.W.2d 871, 875 (1964) ("After a principle, rule or proposition of law has been squarely decided by the Supreme Court, or the highest court of the State having jurisdiction of the particular case, the decision is accepted is binding precedent by the same court or other courts of lower rank when the very point is again presented in a subsequent suit between different parties."). Or a legal principle may be followed because the highest court itself continues to follow its own earlier pronouncements on propositions of law for reasons of efficiency, fairness, and legitimacy unless it is convinced that a departure from precedent is necessary. *See, e.g., Sw. Bell Tel. Co. v. Mitchell*, 276 S.W.3d 443, 447 (Tex. 2008).

A much more amorphous concept is persuasive authority — a pronouncement of legal principles from another court or source that a court may but is not obligated to follow. *See, e.g., Penrod Drilling Corp. v. Williams*, 868 S.W.2d 294, 296 (Tex. 1993) ("While Texas courts may certainly draw upon the precedents of the Fifth Circuit, or any other federal or state court, in determining the appropriate federal rule of decision, they are *obligated* to follow only higher Texas courts and the United States Supreme Court.") (emphasis in original); *see also City of Beaumont v. Bouillion*, 896 S.W.2d 143, 148 (Tex. 1995) (Surveying decisions from other states in assessing whether there is an implied private right for damages arising under the Texas Constitution's free speech and free assembly sections, and stating: "As we consider the reasoning underpinning these decisions, we recognize them as persuasive authority, but we also recognize that we are not controlled by any one approach used by other states interpreting specific provisions of their constitutions.").

This paper explores an area of persuasive authority involving a new wrinkle: invocations of restatements published by the American Law Institute. The new wrinkle in Texas is a new statutory provision addressing how courts look at the ALI's restatements. *See* Tex. Civ. Prac. & Rem. Code Ann. § 5.001(b). If the legislature tells courts that restatements are "not controlling," do the restatements still count? Should you still cite them?

The short answer is "yes." Some background will put this discussion in context.

II. "[T]he American Law Institute's Restatements of the Law are not controlling."

A. CPRC Section 5.001 and its historical context.

In 2019 the Texas Legislature amended Section 5.001 of the Civil Practice and Remedies Code to add this language:

> (b) In any action governed by the laws of this state concerning rights and obligations under the law, the American Law Institute's Restatements of the Law are not controlling.

Tex. Civ. Prac. & Rem. Code Ann. § 5.001(b).[1]

To understand the impetus behind this amendment — and to understand how to cite the restatements effectively — it is important understand (1) the history of the restatement projects; and (2) tensions that have surrounded the project, which recently surfaced anew in some state legislatures.

1. What the restatements are.

The American Law Institute is an organization of about 3,500 judges, lawyers, and law professors.[2] Its members include seven of the nine current members of the Supreme Court of Texas, as well as many former justices on the court. The ALI originated in the 1920s as a result of movements within both the American Bar Association and the American Association of Law Schools to attempt to classify, state the fundamental principles of, and improve American law.[3]

Over it history, the ALI has published model codes, principles of the law, and restatements of the law. The model codes it has created include the Uniform Commercial Code and the Model Penal Code. The ALI's "principles of the law" are primarily addressed to legislatures, administrative agencies, or private actors and often suggest best practices or proposals for reform.[4]

The restatements are the references for which the ALI is perhaps best known.[5] Restatements "provide lawyers and judges with carefully formulated descriptions of the law and traditionally have served as authoritative guides for both legal briefs and judicial opinions."[6] The University of Texas School of Law has long had a significant role in the ALI and its restatement projects with the leadership of Professor Charles Alan Wright and Deans Page Keeton, Bill Powers, and Ward Farnsworth.

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[1] The preexisting portion of the statute provides "The rule of decision in this state consists of those portions of the common law of England that are not inconsistent with the constitution or the laws of this state, the constitution of this state, and the laws of this state." Tex. Civ. Prac. & Rem. Code Ann. § 5.001(a).
[2] Shirley S. Abrahamson, *Refreshing Institutional Memories: Wisconsin and the American Law Institute the Fairchild Lecture*, 1995 Wis. L. Rev. 1, 7 (1995).
[3] *Id*.
[4] Am. Law Inst., *Capturing the Voice of the American Law Institute: A Handbook for ALI Reporters and Those Who Review Their Work*, 4, 13 (rev. ed. 2015), https://www.ali.org/media/filer_public/65/25/6525b3d0-0ac1-4dba-b2bb-5b0eb022fd55/stylemanual.pdf.
[5] Abrahamson, *supra* note 2.
[6] Jonathan R. Macey, *The Transformation of the American Law Institute*, 61 Geo. Wash. L. Rev. 1212, 1216 (1993).

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