

University of Texas School of Law  
30th Annual Conference on State and Federal Appeals

June 5, 2020  
Austin, Texas

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

William J. Boyce  
Robert. B. Dubose  
Alexander Dubose &  
Jefferson LLP  
1844 Harvard St.  
Houston, Texas 77008  
713-589-3573  
[bboyce@adjtlaw.com](mailto:bboyce@adjtlaw.com)  
[rdubose@adjtlaw.com](mailto:rdubose@adjtlaw.com)

## **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).<sup>1</sup>

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.<sup>2</sup> 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.<sup>3</sup>

Over its 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.<sup>4</sup>

The restatements are the references for which the ALI is perhaps best known.<sup>5</sup> 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."<sup>6</sup> 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.

---

<sup>1</sup> 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).

<sup>2</sup> Shirley S. Abrahamson, *Refreshing Institutional Memories: Wisconsin and the American Law Institute the Fairchild Lecture*, 1995 Wis. L. Rev. 1, 7 (1995).

<sup>3</sup> *Id.*

<sup>4</sup> 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](https://www.ali.org/media/filer_public/65/25/6525b3d0-0ac1-4dba-b2bb-5b0eb022fd55/stylemanual.pdf).

<sup>5</sup> Abrahamson, *supra* note 2.

<sup>6</sup> Jonathan R. Macey, *The Transformation of the American Law Institute*, 61 Geo. Wash. L. Rev. 1212, 1216 (1993).

The original purpose of the restatements was to address two major perceived defects in American law: (1) its uncertainty, and (2) its complexity.<sup>7</sup> The first restatements were intended to “tell judges and lawyers what the law was.”<sup>8</sup> But the intent also included a normative component. The Institute’s charter explained that its purpose was “to promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice, and to encourage and carry on scholarly and scientific legal work.”<sup>9</sup>

Each restatement is the product of years of study, drafting, and editing by a large group of legal experts in a substantive area of law. Restatements are the end result of the collaboration and deliberation of (1) “Reporters” — the primary drafters of the Restatement, typically academics with expertise in the field, (2) the ALI’s Council, (3) the “Advisors” and “Members Consultative Group” — two groups of experts in the field who provide the Reporters with critical feedback during the drafting process, and ultimately (4) the full membership of the ALI.<sup>10</sup>

## **2. The inherent tensions surrounding restatement projects.**

From the outset, the ALI has debated two questions about the nature of the restatements. First, should the restatements describe what the law is or what it ought to be? Second, how can the restatements remain objective while benefitting from the experience and insights of interested experts? Given the purposes and nature of the restatement projects, it was perhaps inevitable that tensions would arise between its descriptive and normative goals for the project, as well as tension between the need for expertise and the goal of objectivity. Throughout its history, ALI has sought to navigate these “undercurrents of tension.”<sup>11</sup>

### **a. What the law is versus what the law should be.**

The ALI has sought to strike a balance between its stated goals of describing and improving the law. Commentators have debated whether the early history and founding documents of the ALI demonstrate that the primary purpose of the restatements was description or reform. Some conclude that the historical record reflects that the initial restatements were a formalist project to articulate and “to save the common law from

---

<sup>7</sup> Kristen David Adams, *The Folly of Uniformity? Lessons from the Restatement Movement*, 33 Hofstra L. Rev. 423, 433 (2004).

<sup>8</sup> *Id.* (quoting American Law Institute, *About the American Law Institute*, <http://www.ali.org/ali/thisali.htm>).

<sup>9</sup> Adams, *supra* note 7, at 434 (quoting American Law Institute, Certificate of Incorporation, in Annual Report of the American Law Institute 2002, at 51).

<sup>10</sup> John K. DiMungo, *The American Law Institute’s Restatement, Law of Liability Insurance: A Final Update*, 30 No. 6 Cal. Ins. L. & Reg. Rep. (July 2018).

<sup>11</sup> See Abrahamson, *supra* note 2, at 7.

statutory liberalization.”<sup>12</sup> Others conclude that the founders’ purpose was “‘progressive-pragmatic’ reform, to state what the law ought to be.”<sup>13</sup> Thus, the founding documents provide at least some support for both the “is” and the “ought” purposes of the restatements.<sup>14</sup>

The later history of the restatements reflects a continuing debate concerning these two purposes. The initial series of restatements, published in the first two decades of the ALI, sounded a legal formalist tone and appeared to emphasize the “is.”<sup>15</sup> Yet some scholars complained that this objective tone was misleading, and that the basis for the restatements’ pronouncements often was difficult to determine and verify.<sup>16</sup>

Responding to this criticism, in the second series of restatements developed after World War II, the ALI expanded the commentary in the restatements. This expansion included the background and reasons for black-letter rules of law, and in some instances selected a minority view as the black-letter rule when it seemed the superior view.<sup>17</sup> The ALI’s third director, Professor Herbert Wechsler, articulated the working formula for this approach — to “weigh all of the considerations relevant to development of the common law that our polity calls on the highest courts to weigh in their deliberations.”<sup>18</sup>

A number of formalists have criticized the ALI’s perceived shift toward a more normative approach. Justice Scalia, for instance, complained that “the Restatements’ authors have abandoned the mission of describing the law, and have chosen instead to set forth their aspirations for what the law ought to be.”<sup>19</sup> He suggested judges cannot safely assume, “without further inquiry, that a Restatement provision describes rather than revises current law.”<sup>20</sup>

This debate continues today as the ALI attempts to strike a balance between “is” and “ought.” Recent commentators criticize recent restatements for leaning too far in a normative direction.<sup>21</sup> Others see the contemporary restatements as essentially descriptive:

---

<sup>12</sup> N.E.H. Hull, *Restatement and Reform: A New Perspective on the Origins of the American Law Institute*, 8 *Law & Hist. Rev.* 55, 56 (1990).

<sup>13</sup> Abrahamson *supra* note 2, at 18.

<sup>14</sup> *Id.* at 19.

<sup>15</sup> See Abrahamson, *supra* note 2, at 19.

<sup>16</sup> *Id.* at 19.

<sup>17</sup> *Id.* at 20.

<sup>18</sup> Herbert Wechsler, *Report of the Director*, 43 *A.L.I. Proc.* 27 (1966).

<sup>19</sup> *Kansas v. Nebraska*, 574 U.S. 445, 475 (2015) (J. Scalia, concurring).

<sup>20</sup> *Id.* Even this observation was not a blanket rejection of references to restatements in opinions written by Justice Scalia in all contexts. See, e.g., *Jennings v. Stephens*, 574 U.S. 271, 277 (2015) (citing Restatement (Third) of Foreign Relations Law of the United States (1987)).

<sup>21</sup> See, e.g., Charles A. Sullivan, *Restating Employment Remedies*, 100 *CORNELL L. REV.* 1391 (2015) (“As with any Restatement, Employment Law reflects a tension between faithfully reflecting the prevailing law and improving that law by choosing the better rule.”); DiMungo, (“Although the ALI describes Restatements of the Law as ‘clear formulations of common law and its statutory elements or variations,’

The benefits of ... Restatements, and this Restatement in particular, are ... the doctrinal organization, the identification of issues, the bringing of order to the process, and the identification ... of areas which are open and evolving. ... Restatements are more descriptive than prescriptive[,] ... a collection of the judicial thinking[,] ... the classic definition of black letter.<sup>22</sup>

Although controversial restatement provisions tend to attract the attention of commentators and critics, many reflect the uncontroversial applicability of accepted legal principles governing most disputes.<sup>23</sup>

**b. Objectivity and interest group participation.**

Another tension inherent in the restatements also helps to explain recent criticisms raised in state legislatures — the tension between a desire for objectivity and the need to consult with interested experts.

The growing stature of the restatements over the past century has caused some interest groups to care deeply about the content of the restatements and to seek influence over restatements-in-the-making. Restatements can have “substantial impact in the ‘real world’” and the “potential stakes are enormous.”<sup>24</sup> For instance, because each iteration of the Restatement of the Law of Products Liability has informed the legal rules governing product-related suits for a generation, the plaintiff and defense bars, as well as manufacturers and pharmaceutical companies, have had intense interest in the process of drafting this restatement.<sup>25</sup>

As a result, some critics have charged that the prestige and influence of the ALI “has made the group a natural target for interest-group lobbying.”<sup>26</sup> One ALI member claimed that, when the ALI was debating an important provision of the Principles of Corporate Governance, “[y]ou had corporations calling their outside counsel making it very clear how the client wanted the vote to come out.”<sup>27</sup> As a result, a few commentators

---

reflecting ‘the law as it presently stands or as it might plausibly be stated by a court,’ the line between restating the law and promoting legal change is not always clear.”).

<sup>22</sup> Judge Marsha S. Berzon et al., *Judicial Assessment of the Restatement of Employment Law*, 100 CORNELL L. REV. 1453, 1460 (2015).

<sup>23</sup> See Scott A. Moss, *The Value of the Restatement of Employment Law, Based on 50-State Empirical analyses and the Importance of Clarifying Disputed Issues – But with Caveats about the Restatement’s Imperfect Work Product*, 21 Employee Rts. & Emp. Pol’y J. 409, 418 (2017) (arguing that while the Restatement of Employment Law addresses some issues where the states’ laws are not uniform, many provisions do a good job of describing the existing consensus).

<sup>24</sup> Abrahamson, *supra* note 2, at 6.

<sup>25</sup> *Id.*

<sup>26</sup> Adams, *supra* note 7 at 440.

<sup>27</sup> Monroe H. Freedman, *Caveat Lector: Conflicts of Interest of ALI Members in Drafting the Restatements*, 26 Hofstra L. Rev. 641, 643 (1998).

have suggested that particular restatements reflected an unbalanced influence of particular groups. One law school professor charged that “The Restatement (Third) [of Torts: Products Liability] is more like a trade journal.”<sup>28</sup>

In response to concerns regarding partiality, the ALI has steadfastly sought to ensure the objectivity of the restatements. The ALI has declared “the Institute’s reputation for objectivity is one of its most valuable assets.”<sup>29</sup> A “cardinal precept of the ALI demands that practitioner members ‘check their clients at the door.’”<sup>30</sup> As a result, in advisory committee meetings, there are “genuine, open-ended discussions” where members do not always argue from the point of view that might appear to be in their professional interest.<sup>31</sup>

The ALI also encourages objectivity by seeking a diversity of opinion from “representatives of every constituency” regarding a substantive issue.<sup>32</sup> The ALI “is engaged in pro-active efforts to have its membership reflect the increasing diversity of the legal profession.”<sup>33</sup>

Given the prominence of the restatements’ positions regarding controversial legal issues, it is almost inevitable that some interested parties will contend that a restatement provision reflects an interested or biased view. Two reporters recognized that controversy surrounding the Products Restatement was predictable: “political opposition to the Products Restatement may stem not so much from what it says than from the fact that it says anything at all.”<sup>34</sup>

### **3. Recent events leading to the enactment of Section 5.001.**

In light of the importance of the restatements, and the historical debates about their nature and goals, it is unsurprising that they would attract the attention of state legislatures and constituencies seeking to influence legislation. The precipitating event for recent legislation was the ALI’s publication of a new Restatement of the Law of Liability Insurance in 2018.<sup>35</sup>

The Restatement of the Law of Liability Insurance was prepared by a “diverse team of advisers and a members’ consultative group that included lawyers representing

---

<sup>28</sup> Frank J. Vandall, *The American Law Institute is Dead in the Water*, 26 Hofstra L. Rev. 801, 814 (1998).

<sup>29</sup> American Law Institute Policy Statement and Procedures on Conflicts of Interest 1 (adopted by ALI Council, May 16, 1994).

<sup>30</sup> Abrahams, *supra* note \_\_ at 30.

<sup>31</sup> Victor E. Schwartz, *The Restatement (Third) of Torts: Products Liability—the American Law Institute’s Process of Democracy and Deliberation*, 26 Hofstra L. Rev. 743, 754 (1998).

<sup>32</sup> DiMungo, *supra* note 10.

<sup>33</sup> Abrahamson, *supra* note 2, at 35.

<sup>34</sup> James A. Henderson, Jr. & Aaron D. Twerski, *The Politics of the Products Liability Restatement*, 26 Hofstra L. Rev. 667, 686-87 (1998).

<sup>35</sup> Rest., Liability Insurance (Am. Law Inst. 2018).

insurance companies, lawyers representing policy holders, law professors, and judges.”<sup>36</sup> Drafts of key provisions were significantly revised after questions were raised regarding the neutrality of some of the new Restatement’s provisions.<sup>37</sup> One group — the American Property Casualty Insurance Association (APCIA) — sought a new avenue to lobby against this restatement by promoting state legislation to reject the restatement as an authoritative statement of insurance law.<sup>38</sup>

In 2019 four states enacted legislation specifically disapproving of the Restatement of the Law of Liability Insurance. Ohio’s legislature enacted this provision:

The “Restatement of the Law, Liability Insurance” that was approved at the 2018 annual meeting of the American law institute does not constitute the public policy of this state and *is not an appropriate subject of notice*.<sup>39</sup>

Similarly, Michigan’s law prevents courts from applying this Restatement at all:

In an action brought in a court in this state, *the court shall not apply a principle from* the American Law Institute's “Restatement of the Law, Liability Insurance” in ruling on an issue in the case unless the principle is clearly expressed in a statute of this state, the common law, or case law precedent of this state.<sup>40</sup>

North Dakota’s statute not only constrains courts, it also prevents “a person” from giving weight to or recognizing the Restatement of the Law of Liability Insurance “as an authoritative reference regarding interpretation of North Dakota laws, rules, and principles of insurance law.”<sup>41</sup>

Also in 2019, some controversy arose over a proposed Restatement provision addressing parental authority to consent to medical procedures implicating reproductive privacy.

Several measures were proposed in the Texas Legislature in 2019 addressing the restatements. One draft resolution criticized the Restatement of the Law of Liability

---

<sup>36</sup> 2 Witkin, *Summary of California Law*, § 211B (2019).

<sup>37</sup> Robins Kaplan, *Debate Persists: The Controversial Restatement of the Law on Liability Insurance*, Lexology (April 10, 2020), <https://www.lexology.com/library/detail.aspx?g=069f944f-c735-4672-9fbb-941dea533951>

<sup>38</sup> *Id.*

<sup>39</sup> Ohio Rev. Code § 3901.82 (emphasis added); *see also* Ark. Code § 23-60-112 (providing that “[a] statement of the law in the American Law Institute's Restatement of the Law, Liability Insurance does not constitute the public policy of this state if the statement of the law is inconsistent or in conflict with, or otherwise not addressed by” an Arkansas statute, Arkansas case law precedent, or the common law and statute law of England as adopted under Arkansas law).

<sup>40</sup> Mich. Comp. Laws § 500.3032 (emphasis added).

<sup>41</sup> N.D. Cent. Code § 26.1-02-34.



Insurance as “neither consistent with well-established insurance law nor respectful of the role of state legislators in establishing legal standards and practice for the insurance industry” and as “not worthy of recognition by the courts as an authoritative reference.”<sup>42</sup> Another proposed bill stated that the new restatement “shall not be considered in any action governed by the laws of this state.”<sup>43</sup>

The bill analysis for H.B. 2757 — the only restatement-related legislation that ultimately passed in Texas — echoed those concerns, but with language that was both more general and equivocal: “Recent concerns have been raised that the [Restatement of the Law of Liability Insurance] may go beyond summarizing the state of current legal thinking and may be inaccurate or misleading.”<sup>44</sup>

Compared to the statutes passed in Ohio, Michigan, Arkansas, and North Dakota, two features of H.B. 2757 (codified as section 5.001 of the Texas Civil Practice and Remedies Code) are striking. First, it does not single out any particular restatement, but instead refers generally to “the American Law Institute’s Restatements of the Law.”<sup>45</sup> Second, it neither approves nor disapproves any specific restatement provision, but simply states that the restatements “are not controlling.”<sup>46</sup> It does not forbid courts or advocates from citing the restatements. It is neutral with regard to the substance of the restatements, apart from the largely uncontroversial statement that they are not controlling regarding Texas law.

## **B. The restatements and Texas law.**

So where does all this leave Texas courts, lawyers, and litigants considering how particular restatement principles may affect the resolution of a particular issue under Texas law?

It probably leaves them in largely the same place they were before subsection (b) was added to section 5.001.

Restatement principles are woven into Texas law in many different contexts, as demonstrated by thousands of Westlaw hits resulting from a search for Texas cases using the term “Restatement.” To say that the restatements have been cited frequently, however, is *not* to say that Texas courts historically have treated them as “controlling.”

To be sure, there is no shortage of statements in the case law along the following lines: “Texas courts have, in the past, generally adopted and followed the Restatement’s

---

<sup>42</sup> Nicholas Malfitano, ALI Sends in Lobbyists as Texas Lawmakers Consider Denouncing Group’s Insurance Restatement, *Pennsylvania Record* (May 14, 2019), <https://pennrecord.com/stories/512487747-ali-sends-in-lobbyists-as-texas-lawmakers-consider-denouncing-group-s-insurance-restatement>.

<sup>43</sup> *Id.*

<sup>44</sup> Texas Bill Analysis, H.B. 2757 (5/13/2019).

<sup>45</sup> Tex. Civ. Prac. & Rem. Code Ann. § 5.001.

<sup>46</sup> *Id.*

position.” *Tidelands Auto. Club v. Walters*, 699 S.W.2d 939, 942 (Tex. App.—Beaumont 1985, pet. ref’d n.r.e.).

A more nuanced observation is that Texas cases have discussed restatement principles in many contexts. When restatement provisions and comments are aligned with Texas law and policy, Texas courts will look to them in the course of resolving discrete issues under Texas law. In other circumstances, Texas courts decline to follow a restatement provision’s position on a particular issue. This highly context-specific approach may take the following forms:

- Adopting a specific restatement provision. *See, e.g., Exxon Corp. v. Brecheen*, 526 S.W.2d 519, 524 (Tex. 1975) (“We are in agreement with the Restatement (Second) of Torts § 455 (1965), and adopt it as the rule in Texas ... ”); *McKisson v. Sales Affiliates, Inc.*, 416 S.W.2d 787, 790 (1967) (“We are in further agreement with the Torts Restatement rule relating to contributory negligence as a defense to an action based upon strict liability ... ”); *see also Gutierrez v. Collins*, 583 S.W.2d 312, 318 (Tex. 1979).
- Citing a restatement provision as an aid to analysis. *See, e.g., Dew v. Crown Derrick Erectors, Inc.*, 208 S.W.3d 448, 451 (Tex. 2006).
- Noting that the restatement approach is consistent with Texas law. *See, e.g., Burrow v. Arce*, 997 S.W.2d 229, 242 (Tex. 1999) (“The *Restatement’s* approach, as a whole is consistent with Texas law concerning constructive trusts, and we agree with the forfeiture rule stated in section 49 as explained in the comments we have quoted.”); *see also Exxon Corp. v. Emerald Oil & Gas Co., L.C.*, 348 S.W.3d 194, 219 (Tex. 2011).
- Looking to restatement comments to “inform” the court’s analysis. *See, e.g., In re City of Dickinson*, 568 S.W.3d 642, 647 (Tex. 2019) (citing cases).
- Citing relevant restatement principles or comments as part of a decision’s legal analysis without explicitly “adopting” them. *See, e.g., Marsh v. Frost Nat’l Bank*, 129 S.W.3d 174, 178-79 (Tex. App.—Corpus Christ-Edinburg 2004, pet. denied) (citing Restatement (Second) of Trusts §374 cmt. a, f (1959)).
- Citing particular restatement provisions to draw contrasts with established Texas law, or to demonstrate alignment between the restatement position and Texas law. *See, e.g., Bostic v. Georgia-Pacific Corp.*, 439 S.W.3d 332, 344-46 (Tex. 2014).
- Saying in so many words, “Not now, maybe later.” *See, e.g., Johnson County Sheriff’s Posse, Inc. v. Endsley*, 926 S.W.2d 284, 287 (Tex. 1996) (“We reserve for another day whether we will adopt section 359 of the Restatement.”).

- Disagreeing about what a particular restatement principle really means in practical application. *See, e.g., Del Lago Partners, Inc. v. Smith*, 307 S.W.3d 762, 802-03 (Tex. 2010) (Hecht, J., dissenting); *Uniroyal Goodrich Tire Co. v. Martinez*, 977 S.W.2d 328, 345-49 (Tex. 1998) (Hecht, J., dissenting).
- Expressly declining to follow the restatement approach on a particular point. *See, e.g., Pagayon v. Exxon Mobil Corp.*, 536 S.W.3d 499, 505-06 (Tex. 2017) (“Whether a duty to control employees should be imposed when employers know or should know of the necessity and opportunity for exercising control can be determined only after weighing the burden on the employer, the consequences of liability, and the social utility of shifting responsibility to employers. These factors do not support the broad duty of reasonable care in all situations that [the restatement] would impose.”); *see also Baptist Mem’l Hosp. Sys. v. Sampson*, 969 S.W.2d 945, 949 (Tex. 1998); *Am. Tobacco Co. v. Grinnell*, 951 S.W.2d 420, 438 (Tex. 1997).

This approach does not treat the restatements standing alone as “controlling.”

To the contrary, case law expressly recognizes that restatement principles by themselves are *not* controlling absent incorporation into a court decision that is itself binding under *stare decisis* principles. *See, e.g., In re Townley Bypass Unified Credit Trust*, 252 S.W.3d 715, 721 (Tex. App.—Texarkana 2008, pet. denied) (“We recognize that these [restatement provisions and out-of-state decisions] are not controlling authorities, but, having found none, we will follow the logic and reasoning of the Restatement.”). This approach does not follow restatement principles when doing so would contradict controlling Texas court authority. *See Exxon Corp. v. Garza*, 981 S.W.2d 415, 421 n.1 (Tex. App.—San Antonio 1998, pet. denied).

While the restatements present a buffet of principles and concepts on many different topics, Texas courts have been “picky eaters.” *Cf. Ojo v. Farmers Group, Inc.*, 356 S.W.3d 421, 442 (Tex. 2011) (Willett, J., concurring in part).

All of these permutations and more are captured by this statement from a recent decision, which succinctly and deftly navigates section 5.001(b) while citing and discussing restatement provisions: “We are treating the cited Restatement section and comment as persuasive authority rather than controlling authority.” *James Constr. Grp., LLC v. Westlake Chem. Corp.*, 594 S.W.3d 722, 738 n.10 (Tex. App.—Houston [14th Dist.] 2019, pet. filed).

The restatements likely will continue to have the status they long have had in Texas — persuasive authority (especially given the rigorous drafting process involved) that is not controlling. In this respect, the use of the restatements by Texas courts somewhat analogous to State Bar disciplinary rules, Attorney-General opinions, and opinions of the Texas Ethics Commission. For instance, Texas courts have recognized:

- “[T]he disciplinary rules are merely guidelines—not controlling standards—for disqualification motions.”<sup>47</sup>
- “The opinion of the attorney general is not binding on this Court, but it is often persuasive.”<sup>48</sup>
- “[O]pinions of the Texas Ethics Commission are advisory rather than binding.”<sup>49</sup>

The advocate who wishes to avoid overselling a restatement-based argument will

- brief that argument in this “persuasive, not controlling” spirit;
- recognize the longstanding dynamic between “is” and “ought” in the restatements;
- be sensitive to the precise manner in which particular cases refer to restatement principles; and
- remember that a court’s *citation* of restatement principles does not necessarily mean *adoption* of restatement principles. *See Pagayon*, 536 S.W.3d at 505.

This advocate also will be sensitive to those restatement principles that are controversial at any given time use particular care when invoking them to acknowledge the debate.

---

<sup>47</sup> *In re Nitla S.A. de C.V.*, 92 S.W.3d 419, 422 (Tex. 2002).

<sup>48</sup> *In re Smith*, 333 S.W.3d 582, 588 (Tex. 2011).

<sup>49</sup> *Labidi v. Sydow*, 287 S.W.3d 922, 929 (Tex. App.—Houston [14th Dist.] 2009, orig. proceeding).