REPORT OF AJS SPECIAL COMMITTEE ON
UNPUBLISHED JUDICIAL OPINIONS
HAWAI`I CHAPTER OF AMERICAN JUDICATURE SOCIETY

I. THE COMMITTEE

This Committee was appointed by the Honorable James S. Burns, Chairman of the Board of Directors of the Hawai`i Chapter of the American Judicature Society on or about February 2, 2001. The charge given to this Committee by Chief Judge Burns was:

> The special committee was created by the Board of the Chapter to review the critical issue of the role of unpublished opinions in our judicial decision-making process and to make appropriate recommendations. * * * As you know, the American Judicature Society, as noted by Dean Roscoe Pound many years ago, has been in the forefront of every major judicial reform effort in this country. The role of unpublished opinions has become an important issue in our State, and your participation in providing an independent and impartial review and recommendation would be very much appreciated.

The members appointed to this Committee by Chief Judge Burns are: John Komeiji, Douglas A. Crosier, U.S. Magistrate Judge Barry M. Kurren, Walter S. Kirimitsu, Momi Cazimero, James A. Kawachika, Justice Mario R. Ramil, Judge John S. W. Lim, and Judge Marcia J. Waldorf. Subsequently, the following persons were added to this committee: Judge Eden E. Hifo, President of the Hawai`i State Bar Association Michael W. Gibson, and Judicial Selection Commission Member Arthur Y. Park. Bert T. Kobayashi, Jr., past Chairman of the Judicial Selection Commission (1987 - 89) was named as chairperson of this Committee. This report is the joint work product of all members of this Committee.

The work of the Committee spanned a period of about 12 months, during which a number of sources were identified and interviewed on the subject matter. Sources included Ronald T. Y. Moon, the Chief Justice of the Hawai`i Supreme Court; James S. Burns, the Chief Judge of the Hawai`i Intermediate Court of Appeals; G. Richard Morry, Esq., a practicing appellate attorney in the Hawai`i courts, and Mr. Alan Sobel, the Executive Director of the American Judicature Society. The Committee has reviewed all relevant case law (inclusive of but not limited to

Anastoff v. United States, 223 F.3d 898, (eith Cir. 2000), vacated as moot on rehearing en banc, 235 F.3d 1054 (8th Cir. 2000) and Hart v. Massanari, 266 F.3d 1155 (9th Cir. 2001) and the relevant rules as to the citation of unpublished opinions of each of the federal circuits.

Consideration of the issue was prompted by the Eighth Circuit Court of Appeals' decision in Anastasoff v. United States of America, 223 F.3d 898 (8th Cir. 2000), vacated as moot on rehearing en banc, 235 F.3d 1054 (8th Cir. 2000). Prior to its vacatur, the Anastasoff decision held that the 8th Circuit Court of Appeals rule declaring that unpublished opinions are not precedent, was unconstitutional under Article III of the United States Constitution because it purported to confer on the federal courts a power that went beyond the "judicial".

Hawai`i employs a similar appellate rule in prohibiting a memorandum opinion or unpublished dispositional order of the appellate courts from being cited in any other action or proceeding except under certain limited circumstances. Hawai'i Rules of Appellate Procedure ("HRAP") Rule 35. This rule is premised upon the notion that unpublished opinions and orders are non-precedential in nature and therefore should not be relied upon except by the parties to the case in question. See Kema v. Gaddis, 91 Haw. 200, 964 P.2d 334 (1999). In light of the discussion in the Anastasoff case and the practical reality that other litigants and/or their counsel often are aware of and do, in fact, informally resort to unpublished opinions and orders for guidance, the Committee examined the continuing viability of a rule which proscribes a litigant from even citing an unpublished opinion or order in any other action or proceeding, if it may be helpful or instructive to the court.

II. METHODS OF DISPOSITION OF MATTERS BROUGHT BEFORE THE HAWAI`I APPELLATE COURTS

The general guidelines applied by our appellate courts for issuance of summary disposition orders, memorandum opinions and published opinions are:

> (1) Summary disposition orders are issued when the appellate courts are affirming a judgment and the issues raised are decided by application of well- known legal principles to unremarkable facts.
>
> (2) Memorandum opinions are issued when the appellate courts are reversing a judgment or when they are affirming, affirming in part and vacating in part, or affirming in part and reversing in part, but are applying well- known legal principles to unremarkable facts.
>
> (3) Published opinions are issued when explication of the law will provide some benefit to parties, courts, and practitioners. Published opinions are more likely when the case involves unique issues of law, cases of first impression, the application of known legal principles in circumstances different from previous cases, or when known legal principles need further explanation or limitation.

III. CITATION TO UNPUBLISHED OPINIONS

A. THE PRESENT RULE

HRAP 35 presently provides, in pertinent part, as follows:

> (c) Citation. A memorandum opinion or unpublished dispositional order shall not be cited in any other action or proceeding, except when the opinion or unpublished dispositional order establishes the law of the pending case, res judicata or collateral estoppel, or in a criminal action or proceeding involving the same respondent.

Citation of an unpublished opinion or order is thus strictly prohibited, save and except for the limited purposes of establishing the law of the case, res judicata or collateral estoppel, or where the criminal action involves the same respondent. Failure to comply with this rule subjects the attorney of record to sanctions, by fine or otherwise, by the appellate courts. HRAP 51.

B. THE RATIONALE FOR THE PRESENT RULE

The use of unpublished opinions and orders is essentially supported upon three (3) grounds:

> (1) Unpublished opinions and orders are case management tools to assist the appellate courts in timely dispositions of non-precedent setting matters pending before them. In contrast, writing a precedential opinion is an

> exacting and time-consuming process. It involves much more than deciding who wins and who loses in a particular case. It sets the course of the law for all litigants and potential litigants to come.
>
> (2) Unpublished opinions and orders permit the appellate courts to garner consensus on the disposition of cases. While some justices or judges might agree upon the outcome of a case, they might not agree on the precise reasoning or the rule to be applied in future cases. If an opinion or order can remain unpublished, the assent of a potentially dissenting justice or judge can be more easily obtained if he would not otherwise feel obligated to clarify his differences with the majority.
>
> (3) Publishing redundant opinions in the same area of the law based on materially undistinguishable facts will simply clutter up the law books and databases.

IV. SHORT STATEMENT OF THE PROBLEM

There is a problem perceived by the legal community with the continued use of summary disposition orders and, particularly, the inability to cite memorandum opinions despite the fact that these opinions appear to be of substantial length and content and often cite other case law as precedent for the conclusions. In addition, there appears to be inconsistency on the part of the trial courts as to their consideration and use of unpublished opinions. This problem appears to be focused in the Family Court.

There has also been recognition of this problem by the federal courts, which have concluded that if the Hawai`i Supreme Court were able to provide some statement of the basis of the summary disposition orders then the federal courts would be better served. With regard to the habeas corpus practice in the federal courts it is suggested that unless the summary disposition orders in criminal cases are supported by some reasoning the summary disposition orders are not suitable for habeas corpus review by the federal courts. The reason for this concern is that a person convicted of a state offense may challenge the conviction in federal court on federal grounds, but only after he or she has exhausted all state remedies and presented the federal issues to the state appellate courts. The U.S. Supreme Court has held that federal courts, in making their

decisions, are to give great deference to the state court's analysis of the case. In particular, the federal courts must rely on the analysis of the federal issues by the state court so long as it is a reasonable one.[1] However, when the state courts produce summary disposition orders without any statement of reason, the federal courts are confronted with the predicament discussed in Delgado v. Lewis, 223 F.3d 976 (9th Cir. 2000). The Ninth Circuit there noted that absent an articulated rationale for denial from the state court, the "federal courts are left simply to speculate about what 'clearly established law' the state court might have applied, as well as how it was applied."[2] Delgado, 223 F.3d at 982. Despite the frustrations imposed by the state's summary disposition order, the Ninth Circuit ultimately applied a directive from Williams v.Taylor, 5239 U.S. 362 (2000) , but noted that it was without an "analysis to be used when federal courts are presented with a state court decision that is unaccompanied by any *ratio decidendi*." [**Id**].Delgado, 223 F. 3d at 982**.**

V. RELATIONSHIP BETWEEN THE COURT'S WORK LOAD AND SUMMARY DISPOSITION ORDERS AND MEMORANDUM OPINIONS

The use of unpublished memorandum opinion by the Hawai`i appellate courts directly increased as the size of the Hawai`i appellate case docket increased. Beginning as early as 1970, concern began to grow regarding the increasing appellate case docket and the consequential increase in the time it took for a case's final disposition on appeal. Additionally, while the

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[1] See Miller v. Fenton, 474 U.S. 104 (1985) (noting that federal habeas courts "should, of course, give great weight to the considered conclusions of a coequal state judiciary") and Williams v. Taylor, 529 U.S. 362 (2000) (imposing additional restrictions)

[2] 28 U.S.C. § 2254(d)(1) defines two categories of cases in which a state prisoner may obtain federal habeas relief with respect to a claim adjudicated on the merits in state court. Under the statute, a federal court may grant a writ of habeas corpus if the relevant state-court decision was either (1) "contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "involved an unreasonable application of. . . clearly established Federal law, as determined by the Supreme Court of the United States."

number of practicing attorneys and cases on appeal were growing, this same growth was not matched by comparable increases in the number of appellate judges.

Between 1974 and 1982 the average length of time between oral arguments and final disposition increased to more than four years. It was also during this period that summary orders of affirmance emerged as a means to address the appellate backlog. Additionally, Hawai`i appellate courts would increasingly use memorandum opinions to shorten the time period in which cases would be disposed. In 1980, the Hawai`i Intermediate Court of Appeals was created as a means to address the overloading problems facing the Hawai`i Supreme Court. Despite the addition of the Hawai`i Intermediate Court of Appeals, which was conscientiously and substantially working on reducing the caseload, by 1982 it was evident that the Supreme Court's caseload was continuing to increase disproportionately to the Court's disposition rate. During the decade between 1982 and 1992, the Court addressed its caseload by assigning its cases into one of three categories: Cases which would be decided by the Court, cases to be decided by the Intermediate Court of Appeals, and cases which would be decided by memorandum opinions. While this practice did expedite the process, criticism began to reemerge regarding the perceived overuse of memorandum opinions instead of published opinions. The Court then began to limit the number of appeals in which oral arguments would be allowed on the presumption that this would allow more time to the Court to issue opinions. The reduction of oral arguments also resulted in an increase in the number of published opinions. However, despite these efforts, the Court's docket continued to increase and the use of summary disposition orders and memorandum opinions was again on the upswing to reduce the growing backlog of cases.

The committee has discussed the problems with Chief Justice Ronald T. Y. Moon, who was most cooperative, and who indicated that the Court was aware of the situation. Chief Justice Moon stated:

> In an ideal world, I might agree with the proposition that each appellate disposition should be fully explained, published, and subject to citation as authority. However, we must deal with a world in which resources are very limited and demands are very high. Publication of every decision, whether fully reasoned or a simple order, would likely be economically impossible and the delays intolerable.

VI. SCOPE OF THE PROBLEM WITH THE ICA

From 1994 to the present date, the Hawai`i Intermediate Court of Appeals information provides as follows:

TOTAL APPEALS PER FISCAL YEAR (PLUS NUMBER REOPENED STARTING 1999-00)				
Period	Appeals Filed	Monthly Average		
1994-95	846	70.5		
1995-96	807	67.25		
1996-95	726	60.5		
1997-98	780	65		
1998-99	821	68.4		
1999-00	786 (32)	65.5		
	1999	MONTHLY AVERAGE	2000	MONTHLY AVERAGE
July	65 (4)		63 (5)	
August	84 (1)		62 (2)	
September	52 (1)		58 (3)	
October	52 (1)		78 (3)	
November	83 (3)		62 (4)	
December	58 (3)		68 (1)	65
January	69 (6)		61 (1)	
February	20 (1)		49	
March	65 (1)			
April	73 (2)			
May	99 (3)			
June	66 (6)	65.5		

HAWAI'I INTERMEDIATE COURT OF APPEALS								
Period	New	Avg	MemOp	SDO	Pub	D/W	ToHSC	(TOT)
1994-95	220	18.3	32		64	23	47	[166]
1995-96	162	13.5	62	2	75	14	35	[188]
1996-97	132	11.0	201	134	58	12	9	[414]
( ) = plus number reopened or remanded)								
1997-98	148 (2)	12.3	127	117	63	8	0	[315]
1998-99	226 (2)	18.8	87	62	48	2	3	[202]
1999-00	240 (1)	20.0	94 (47.5%)	44 (22.2%)	58 (29.3%)	2	0	[198]
2000-01								
July	21		1	6	3	0	1	[11]
August	11		4	7	2	0	0	[13]
September	13		7	8	1	0	0	[16]
October	39		6	4	4	1	0	[15]
November	1		4	0	8	0	0	[12]
December	13		8 (40.4%)	3 (33.3%)	3 (24.5%)	0	0	[14]
(AVG. 16.3) (TOTAL NEW 98)							(AVG 13.5) TOTAL PAU 81)	
(SIX MONTHS ICA CUMULATIVE NET LOSS 17)								
January	22		12	7	3	3	0	[25]
February	21		7	3	2	1	0	[8]
March	25		14	4	4	0	0	[22]
April								

In July, HSC did 26
In August HSC did 36
In September, HSC did 37
In October, HSC did 34
In November, HSC did 42
In December HSC did 21
In January HSC did 26
In February, HSC did 22
In March, HSC did

	Pub	MemOp	SDO	Dismsd	WD/Dsctnd	Other
July	5	0	6	8	6	1
August	1	1	7	21	3	3
September	3	2	11	15	5	1
October	4	3	12	9	6	0
November	4	1	10	17	9	1
December	3	1	3	11	2	1
January	7	12	3	0	3	1
February	3	0	4	13	2	0
March						
April						

REMAINING FOR DISPOSITION (amount in parenthesis is number pau briefing and ready/NOA)				
Year	SCt	ICA	Total	Plus/Minus
June '94	784	485	1269	+ 57
June '95	779	547	1326	+ 11
June '96	785	552	1337	- 426
June '97	652	259	911	- 313
June '98	506	92	598	- 6
June '99	471	121	592	+ 151
June '00	581 (59)	162	743	
July	602 (68)	172	774	+ 31
August	619 (57)	170	789	+ 15
September	630 (43)	167	797	+ 8
October	654 (48)	176	830	+ 33
November	657 ( )	182	839	+ 9
December	692 (33)	182	874	+ 35
(CUMULATIVE NET LOSS 131)				
January	689 (35)	179	868	- 6
February	695 (46)	187	882	+ 14
March				
April				

VII. **PRACTICE OF THE FEDERAL COURTS**

This problem is not unique to the State of Hawai`i and is currently a concern and problem nationwide and with the federal courts. The American Judicature Society has advised the Committee that no other state chapter of the American Judicature Society has yet to report or opine on this concern. However, the Committee did consider the prevailing practice in each of the federal circuits and found by way of comparison that the rules in the majority of the federal circuits prohibit all citation to unpublished decisions, except in cases where the citation is made to support a claim of res judicata, collateral estoppel, or law of the case. See D.C. Cir. R. 28(c); Fed. Cir. R. 47.6; First Cir. R. 36 (b)(2)(F); Second Cr. R. 0.23; Third Cir. R. IOP 5.8 & 6.2; Seventh Cir. R. 53(b)(2)(iv) & 53(e); Ninth Cir. R. 36-3 (b)(iii).

Other circuits however, allow for the citation of unpublished decisions, but only as persuasive, not binding, authority. See Fourth Cir. R. 36(c); Fifth Cir. R. 47.5.4; Sixth Cir. R. 28(g); Eighth Cir. R. 28(a)(i); Tenth Cir. R. 36.3(B) (1) & (2); Eleventh Cir. R. 36-2. A summary of each circuit follows:

A. FIRST CIRCUIT

First Circuit rule 36 (b)(2)(F) provides:

> (F) Unpublished opinions of this court may be cited in filings with or arguments to this court only in related cases. Otherwise only published opinions may be cited. A published opinion is one that appears in the ordinary West Federal Reporter series (not including West's Federal Appendix) or as a recent opinion intended to be so published. All slip opinions released by the clerk's office are intended to be so published unless they bear the legend "Not For Publication" or some comparable phraseology.

First Cir. R. 36 (b)(2)(F)(emphasis added).

The First Circuit Court rules do not define what constitutes a "related case". However, in the unpublished opinion U.S. v. Seeley, 7 F.3d 219 (1st Cir. 1993), the First Circuit ruled that the district court's reliance on an unpublished opinion was not improper as the case involved a codefendant who was tried separately on the same charges. The Court held that the "issues in Judge Keeton's opinion were directly related to those here," and thus were citable as authority under Rule 36.

B. SECOND CIRCUIT

Second Circuit Rule 0.23 provides:

> The demands of an expanding case load require the court to be ever conscious of the need to utilize judicial time effectively. Accordingly, in those cases in which decision is unanimous and each judge of the panel believes that no jurisprudential purpose would be served by a written opinion, disposition will be made in open court or by summary order.

> Where a decision is rendered from the bench, the court may deliver a brief oral statement, the record of which is available to counsel upon request and payment of transcription charges. Where disposition is by summary order, the court may append a brief written statement to that order. Since these statements do not constitute formal opinions of the court and are unreported or not uniformly available to all parties, they shall not be cited or otherwise used in unrelated cases before this or any other court.

Second Cr. R. 0.23 (emphasis added).

C. **THIRD CIRCUIT**

Third Circuit Rules of Internal Operating Procedure Rule 5.8 "Citations" provides as follows:

> Because the court historically has not regarded unpublished opinions as precedents that bind the court, the court by tradition does not cite to its unpublished opinions as authority.

Third Cir. R. IOP 5.8.

D. **FOURTH CIRCUIT**

Fourth Circuit rule 36(c) provides:

> In the absence of unusual circumstances, this Court will not cite an unpublished disposition in any of us published opinions or unpublished dispositions. Citation of this Court's unpublished dispositions in briefs and oral arguments in this Court and in the district courts within this Circuit is disfavored, except for the purpose of establishing res judicata, estoppel, or the law of the case.
> If counsel believes, nevertheless, that an unpublished disposition of any court has precedential value in relation to a material issue in a case and that there is no published opinion that would serve as well, such disposition may be cited if counsel serves a copy thereof on all other parties in the case and on the Court. Such service may be accomplished by including a copy of the disposition in an attachment or addendum to the brief pursuant to the procedures set forth in Local Rule 28(b).

Fourth Cir. R. 36(c).

E. FIFTH CIRCUIT

The Fifth Circuit has a split policy relating to unpublished opinions which provides that opinions prior to January 1, 1996 are precedent but should be cited in limited situations. Rule 47.5.3 provides:

> 47.5.3 Unpublished Opinions Issued Before January 1, 1996. Unpublished opinions issued before January 1, 1996, are precedent. However, because every opinion believed to have precedential value is published, such an unpublished opinion should normally be cited only when the doctrine of res judicata, collateral estoppel or law of the case is applicable (or similarly to show double jeopardy, abuse of the writ, notice, sanctionable conduct, entitlement to attorney's fees, or the like). A copy of any unpublished opinion cited in any document being submitted to the court, must be attached to each copy of the document.

However, for decisions issued after January 1, 1996, those decisions may have persuasive value apart from the value in related cases. Rule 47.5.4 provides:

> 47.5.4 Unpublished Opinions Issued on or After January 1, 1996. Unpublished opinions issued on or after January 1, 1996, are not precedent, except under the doctrine of res judicata, collateral estoppel or law of the case (or similarly to show double jeopardy, abuse of the writ, notice, sanctionable conduct, entitlement to attorney's fees, or the like). An unpublished opinion may, however, be persuasive. An unpublished opinion may be cited, but if cited in any document being submitted to the court, a copy of the unpublished opinion must be attached to each document. The first page of each unpublished opinion bears the following legend:
>
> > Pursuant to 5th Circuit Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Circuit Rule 47.5.4.

Fifth Cir. R. 47.5.4

F. SIXTH CIRCUIT

Sixth Circuit rule 28(g) provides:

> g) Citation of Unpublished Decisions. Citation of unpublished decisions in briefs and oral arguments in this Court and in the

> district courts within this Circuit is disfavored, except for the purpose of establishing res judicata, estoppel, or the law of the case. If a party believes, nevertheless, that an unpublished disposition has precedential value in relation to a material issue in a case, and that there is no published opinion that would serve as well, such decision may be cited if that party serves a copy thereof on all other parties in the case and on this Court. Such service shall be accomplished by including a copy of the decision in an addendum to the brief.

Sixth Cir. R. 28(g).

G. **SEVENTH CIRCUIT**

Seventh Circuit Rule 53(b)(2)(iv) provides:

> (2) Unpublished orders:
> …
> (iv) Except to support a claim of res judicata, collateral estoppel or law of the case, shall not be cited or used as precedent

Seventh Cir. R. 53(b)(2)(iv).

Further in rule 53, the section provides:

> Except to the purposes set forth in Circuit Rule 53(b)(2)(iv), no unpublished opinion or order of any court may be cited in the Seventh Circuit if citation is prohibited in the rendering court.

Seventh Cir. R. 53.

H. **EIGHTH CIRCUIT**

Eighth Circuit rule 28A(i) provides:

> (i) Citation of Unpublished Opinion. Unpublished opinions are not precedent and parties generally should not cite them. When relevant to establishing the doctrines of res judicata, collateral estoppel, or the law of the case, however, the parties may cite any unpublished opinion. Parties may also cite an unpublished opinion of this court if the opinion has persuasive value on a material issue and no published opinion of this or another court would serve as well. A party who cites an unpublished opinion in a document must attach a copy of the unpublished opinion to the document. A party who cites an unpublished opinion for the first time at oral argument must attach a copy of the unpublished opinion to the supplemental authority letter required by FRAP 28(j). When citing an

> unpublished opinion, a party must indicate the opinion's unpublished status.

Eighth Cir. R. 28A(i)(emphasis added).

I. NINTH CIRCUIT

Circuit Rule 36-3 of the Ninth Circuit has been adopted for a limited 30-month period, beginning July 1, 2000 and ending December 31, 2002. Unless, by December 31, 2002, the Court votes affirmatively to extend the rule, it will automatically expire on December 31, 2002 and the former version of Circuit Rule 36-3, prohibiting citation of dispositions under all circumstances will be reinstated. The rule provides:

> Rule 36-3. Citation of Unpublished Dispositions or Orders
> (a) Not Precedent. Unpublished dispositions and orders of this Court are not binding precedent, except when relevant under the doctrines of law of the case, res judicata, and collateral estoppel.
> (b) Citation. Unpublished dispositions and orders of this court may not be cited to or by the courts of this circuit except in the following circumstances.
> (i) They may be cited to this Court or to or by any other court in this circuit when relevant under the doctrine of law of the case, res judicata, or collateral estoppel.
> (ii) They may be cited to this Court or by any other courts in this circuit for factual purposes, such as to show double jeopardy, sanctionable conduct, notice, entitlement to attorneys' fees, or the existence of a related case.
> (iii) They may be cited to this Court in a request to publish a disposition or order made pursuant to Circuit Rule 36-4, or in a petition for panel rehearing or rehearing en banc, in order to demonstrate the existence of a conflict among opinions, dispositions, or orders.
> (c) Attach Copy. A copy of any cited unpublished disposition or order must be attached to the document in which it is cited, as an appendix.
> Ninth Cir. R. 36-3 (b)(iii);

J. TENTH CIRCUIT

Effective January 1, 1999, Rule 36.3 of the Tenth Circuit, entitled "Citation of unpublished opinions/orders and judgments" provides:

> (A) Not Precedent. Unpublished orders and judgments of this court are not binding precedents, except under the doctrines of law of the case, res judicata, and collateral estoppel.
> (B) Reference. Citation of an unpublished decision is disfavored. But an unpublished decision may be cited if:

(1) it has persuasive value with respect to a material issue that has not been addressed in a published opinion; and
(2) it would assist the court in its disposition.
(C) Attach Copy. A copy of an unpublished decision must be attached to any document that cites it. If an unpublished decision is cited at oral argument, the citing party must provide a copy to the court and the other parties.

Tenth Cir. R. 36.3(B) (1) & (2).

K. ELEVENTH CIRCUIT

Rule 36-2 of the Eleventh Circuit provides:

> An opinion shall be unpublished unless a majority of the panel decides to publish it. Unpublished opinions are not considered binding precedent. They may be cited as persuasive authority, provided that a copy of the unpublished opinion is attached to or incorporated within the brief, petition, motion or response in which such citation is made.

Eleventh Cir. R. 36-2.

L. FEDERAL CIRCUIT

Local Rule 47.6 of the Federal Circuit provides:

> Opinion and Order of the Court
> (a) Disposition of Appeal, Motion, or Petition; Precedential Effect. Disposition of an appeal may be announced in an opinion; disposition of a motion or petition may be announced in an order. An appeal may also be disposed of in a judgment of affirmance without opinion pursuant to Federal Circuit Rule 36. A disposition may be cited as precedent of the court unless it is issued bearing a legend specifically stating that the disposition may not be cited as precedent.
> (b) Nonprecedential Opinion or Order. An opinion or order which is designated as not to be cited as precedent is one unanimously determined by the panel issuing it as not adding significantly to the body of law. **Any opinion or order so designated must not be employed or cited as precedent.** This rule does not preclude assertion of claim preclusion, issue preclusion, judicial estoppel, law of the case, or the like based on a decision of the court designated as nonprecedential.
> (c) Request to Make an Opinion or Order Precedential; Time for Filing. Within 60 days after any nonprecedential opinion or order is issued, any person may request, with accompanying reasons, that

> the opinion or order be reissued as precedential. An original and 6 copies of the request must be filed with the court. The request will be considered by the panel that rendered the disposition. The requestor must notify the court and the parties of any case that person knows to be pending that would be determined or affected by reissuance as precedential. Parties to pending cases who have a stake in the outcome of a decision to make precedential must be given an opportunity to respond. If the request is granted, the opinion or order may be revised as appropriate.
> (d) Public Records. All dispositions by the court in any form will be in writing and are public records.

Fed. Cir. R. 47.6 (emphasis added).

M. **DC CIRCUIT**

The Rules for the United States Court Of Appeals For The District Of Columbia Circuit Rule 28(c) provides as follows:

> (c) Citation to Unpublished Disposition. Unpublished orders or judgments of this court, including explanatory memoranda and sealed opinions, are not to be cited as precedent. The same rule applies to unpublished dispositions of district courts, and to unpublished dispositions of other courts of appeals if those appellate courts have a rule similar to this one. Counsel may refer to an unpublished disposition, however, when the binding or preclusive effect of the disposition, rather than its quality as precedent, is relevant. In that event, counsel must include in an appropriately labeled addendum to the brief a copy of each unpublished disposition cited therein. The addendum may be bound together with the brief, but separated from the body of the brief (and from any other addendum) by a distinctly colored separation page. If the addendum is bound separately, it must be filed and served concurrently with, and in the same number of copies as, the brief itself.

N. **GUAM**

"Guam courts afford the same respect to published and unpublished decisions." People of Territory of Guam v. Yang, 800 F.2d 945 (9th Cir.(Guam) 1986).

VIII. RECOMMENDATIONS

A. INCREASE OF THE NUMBER OF APPELLATE JUDGES

It is the opinion of the Committee that there is a direct correlation between the fact that the increased number of practicing attorneys and appeals to the Hawai`i appellate courts outstrips the number of appellate judges. This, in turn, results in a proportionate increase in the number of summary disposition orders and unpublished memorandum opinions. Therefore, the Committee recommends that the Hawai`i Chapter of the American Judicature Society support any effort to legislatively increase the number of appellate judges.

B. CONSIDER AT LEAST AS TO CRIMINAL MATTERS THAT THE SUMMARY DISPOSITION ORDERS CONTAIN SOME BASIS FOR THE DECISION OF THE COURT

The Committee encourages the appellate courts to provide some explanation or rationale, however brief, for their decisions, particularly as to criminal decisions that affect the habeas corpus situations.

C. ABILITY TO CITE UNPUBLISHED MEMORANDUM OPINIONS - A PROPOSAL TO AMEND HRAP 35

The Committee respects the appellate courts' need for flexibility in utilizing the unpublished opinion mechanism to dispose of cases in a timely and efficient manner. To be sure, it commends the appellate courts' past efforts at significantly reducing the backlog of cases through the use of memorandum opinions and summary disposition orders.

By the same token, however, the Committee notes that a significant body of law has developed through the use of unpublished opinions and orders. While these opinions and orders are admittedly non-precedential by virtue of their non-publication and hence, non-binding in any other action or proceeding, they are nonetheless instructive to litigants and counsel alike (and presumably would be to the deciding court if they are permitted to be cited) as to how the

appellate courts may view cases or issues of similar import to the case or issue in question. These opinions and orders are moreover easily accessible through on-line sources and therefore are theoretically available to the public.

Indeed, there is empirical evidence of the value and apparent widespread use of unpublished opinions and orders in the family law practice arena. The Family Law Section of the Hawai'i State Bar Association is one of the most organized and active sections of the bar association. As part of the benefits it offers to its members, the Section regularly reports summaries of memorandum opinions and summary disposition orders of significance in family law. These unpublished opinions are, in relevant circumstances, then used by the practitioners to advise their clients as to how the appellate courts are likely to view those issues in their cases which may be similar to the issues discussed in the opinions. Again, while aware of its non-binding nature, the practitioners nonetheless find the opinions to be of great instructional and guidance value.

The Committee thus feels that citation to these opinions and orders should, at a minimum, be permitted in briefs or memoranda filed in any other action or proceeding, provided, of course, that they have persuasive value. The present rule that these opinions and orders shall neither be cited nor considered to be controlling authority except when they establish the law of the case, res judicata or collateral estoppel, or are cited in a criminal action or proceeding involving the same respondent, may remain intact. In short, the new proposed rule would simply permit a party to cite an unpublished opinion for its persuasive value alone.

The Committee feels that permitting the citation of relevant, albeit non-binding, opinions and orders will also assist the court to whom they are cited in its ultimate consideration and decision in the case. The court is free to either accept or totally disregard the cited opinion or

order for its persuasive value. The ultimate purpose of the new proposed rule is to present the deciding court with the full panoply of options and arguments available in order to assist it in making the best and most reasoned judgment available.

Further, given the unpublished nature of the opinion or order, the new proposed rule requires that a copy of any cited memorandum opinion or unpublished dispositional order be attached in an appendix to the brief or document in which it is cited. The rule also requires that, after diligent search, the citing party shall indicate any subsequent disposition of the cited opinion or order by the appellate courts. Similarly, if an unpublished decision is cited at oral argument, the citing party shall provide a copy of the same to the court and the other parties.

After extensive review and study of the matter and interviews of various resource persons, including the Chief Justice of the Hawai`i Supreme Court and the Chief Judge of the Intermediate Court of Appeals, the Committee thus concludes and recommends that HRAP 35 should be amended to allow a party to cite a memorandum opinion or unpublished dispositional order in any action or proceeding, provided it has persuasive value.

D. APPLICATION FOR PUBLICATION OF AN UNPUBLISHED OPINION

While the Committee came to consensus that parties/litigants should be allowed to cite to unpublished opinions (with certain conditions), it was understood that that would not make those opinions binding precedent with the court. Therefore, the Committee also looked at the (probably rare) situation of a party's desire that an unpublished opinion carry the weight of binding precedent.

The Committee then agreed that, in addition to the allowed citation of unpublished opinions, an additional rule change that would allow a party or interested person to apply for publication of an unpublished opinion might serve a rarely used, but valuable, purpose.

To avail oneself of this sort of process would take time. Therefore, it is clear that this approach does not provide sufficient remedy for a party in a litigation while court proceedings are ongoing. However, in a situation such as is presented by the Hawai'i Supreme Court decision in AIG Hawai'i Ins.Co., Inc. v. Yucoco, 91 Hawai'i 123 (1998)(memorandum opinion), it may well be appropriate to take the time to formally apply for publication.

This is an observation made by others. "Many commentators have expressed their concerns with the assumption that unpublished equals unprecedential." Sheree L. K. Nitta, The Price of Precedent: Anastasoff v. United States, U. Haw. L. Rev. 795, 814 (2001). Indeed, "[o]ne judge has even admitted that, 'when we make our ad hoc determination that a ruling is not significant enough for publication, we are not in as informed a position as we might believe. Future developments may well reveal that the ruling is significant indeed.'" Id. "Numerous studies have demonstrated that opinions that were precedential did indeed go unpublished." Id., at 815.

A draft of the proposed amended rule, including both the language allowing for the citation of unpublished opinions and the application for publication of unpublished opinions is attached hereto as Exhibit "A". Deletions are bracketed and additions are underscored.

EXHIBIT "A"

PROPOSED APPELLATE RULE CHANGE:

Rule 35. Dispositions.

(a) Class of dispositions. Dispositions may be rendered by a designated judge or justice and may take the form of published, per curiam, or memorandum opinions or dispositional orders.

(b) Publication. Memorandum opinions shall not be published. Dispositional orders shall not be published except upon the order of the appellate court.

(c) Application for Publication. Any party or other interested person may apply for good cause shown to the court for publication of an unpublished opinion.

[c] (d) Citation. A memorandum opinion or unpublished dispositional order shall not be considered nor shall be cited in any other action or proceeding as controlling authority, except when the opinion or unpublished dispositional order establishes the law of the pending case, re judicata or collateral estoppel, or in a criminal action or proceeding involving the same respondent.

In all other situations, a memorandum opinion or unpublished dispositional order may be cited in any other action or proceeding if the opinion or order has persuasive value. A party who cites a memorandum opinion or unpublished dispositional order shall attach a copy of the opinion or order to the document in which it is cited, as an appendix, and shall indicate any subsequent disposition of the opinion or order by the appellate courts known after diligent search. If an unpublished decision is cited at oral argument, the citing party shall provide a copy to the court and the other parties. When citing an unpublished opinion or order, a party must indicate the opinion's unpublished status.

(e) Mailing by appellate clerk. The appellate clerk shall promptly mail or telefax all parties a copy of the opinion or dispositional order.

(f) Terminology. When used in an opinion or dispositional order, the word "reverse" ends litigation on the merits, and the phrase "vacate and remand" indicates the litigation continues in the court or agency in accordance with the appellate court's instruction.