DISSENT BY NAKAYAMA, J.

I respectfully dissent.

The members of the Committee on the Hawai i Rules of Appellate Procedure considered this proposal and unanimously recommended against adoption of this amendment. The members of the committee include representatives from the Office of the Public Defender, the Office of the Prosecuting Attorney, the Attorney General, and private practitioners representing the civil defense and plaintiffs bar and the private criminal defense bar. Their objections were many, including the undue burden and expense placed on those attorneys who actually practice appellate law, by compelling them to spend additional hours in researching unpublished dispositions. Additionally, comments submitted by members of the bar cited to the undependable and unpredictable emphasis any given judge will place on an unpublished decision when it is to be given

persuasive but not precedential value.

Further, as noted in a Yale Law Journal case note, implementation of a rule allowing citation to unpublished opinions will disproportionately disadvantage litigants with the fewest resources[] . . . [by affecting] litigants at the bottom of the economic spectrum in two ways: First, it would increase delays in adjudication, delays from which the poorest litigants are likely to suffer the most, and second, it would create a less accessible class of precedents. Daniel B. Levin, Fairness and Precedent, 110 Yale L.J. 1295 (2001).

> In addition to the problems posed for the poorest litigants by clogged dockets, the [proposed] rule presents a second problem for these litigants: unequal access to precedent. Limiting the precedential effect of unpublished opinions through noncitation rules ensures that litigants will have equal access to precedent, and thus a fair shot at litigating their cases. Though

> unpublished opinions are available on commercial databases or through court clerks offices (and, in four circuits, for free through court websites), finding these precedents, even when they are available for free, requires time, energy and money, and places those litigants with greater resources at an advantage over those with fewer (including pro se litigants, public defenders, and public-interest litigants). Judge Arnold worries that litigants may be unable to invoke a previous decision of the court as precedent, even if the case is directly on point, because a previous panel has designated the opinion unpublished and therefore uncitable. A full precedent system would avoid this situation. But even if this proverbial needle in the haystack were available to litigants, only those with the resources to search for it could benefit from it. By putting impecunious litigants at a systematic disadvantage, throwing the vast opus of unpublished opinions into the body of precedent would violate these individuals right to equal concern and respect.
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> . . . The [proposed] rule . . . would not only threaten the efficiency of judicial administration, it would harm the ability of individuals at the bottom of the economic spectrum to bring their cases. Making all opinions carry full precedential effect will not optimize the amount of precedent. The benefits precedent brings to the judicial system, in terms of predictability, stability, and fairness in adjudication, are distributed among all participants in the system. Likewise, the marginal benefit of the [proposed] rule would be distributed among all participants in the judicial system. But the costs of the vast increase in precedents are likely to be borne by those litigants on the lowest rungs of the economic ladder. This systematic unfairness to the poorest individuals in the justice system, impinging on their right to present their cases, should prevent courts from mandating that all unpublished opinions carry precedential weight.

Id.

I have not been persuaded that the implementation of the rule amendment is necessary and have not been presented with any evidence that the rule as presently written is insufficient to allow attorneys to argue and present their cases to the courts in a professional and adequate manner.

For the above reasons, I dissent.