

DISSENT BY ACOBA, J.

I respectfully dissent.

I would not limit citation of unpublished dispositions to those issued after the amendment's proposed effective date of July 1, 2008. The amendment allowing citations to unpublished dispositions was initially suggested by the Hawaii Chapter of the American Judicature Society (AJS) on April 24, 2002, and has been pending for several years. See Stephen R. Barnett, No-Citation Rules Under Siege: A Battlefield Report and Analysis, 5 J. App. Prac. & Proc. 473, 487 n.45 (2003) (The Hawaii Supreme Court currently has before it a proposal to amend Rule 35 of the Hawaii Rules of Appellate Procedure [(HRAP)] to allow citation to unpublished appellate [dispositions] for their persuasive value. Comments were due in the Supreme Court by December 29, 2003. (Citations omitted.)). At the time of its issuance on April 24, 2002, the AJS report indicated that there were unpublished dispositions that were worthy of citation and spurred efforts to permit citation to unpublished dispositions.¹

¹ The concerns about access to opinions for litigants with fewer resources address a more general disparity within the legal system that should not be confused with the specific policy concerns of citation to unpublished opinions. See Jessie Allen, The Right to Cite: Why Fair and Accountable Courts Should Abandon No-Citation Rules, NYU Brennan Center for Justice, September 2005, available at <http://www.nonpublication.com/allen.pdf> (If attorneys, or pro se litigants, do not have computer access, they are already at an extreme disadvantage for efficient litigation; lack of access to citable but nonprecedential opinions will not greatly increase that problem.); Judge Samuel A. Alito, Jr., Report of Advisory Committee on Appellate Rules, Committee on Rules of Practice and Procedure, May 6, 2005, at 9 (The disparity between litigants who are wealthy and those who are not is an unfortunate reality. . . . The solution to these disparities is not to forbid all parties from citing unpublished opinions. (Emphasis in original.); Vincent M. Cox, Freeing Unpublished Opinions From Exile: Going Beyond the

(continued...)

In this jurisdiction, the AJS proposal preceded the U.S. Supreme Court's adoption of a rule allowing citation of unpublished dispositions. See Douglass v. Pflueger Hawaii, Inc., 110 Hawaii 520, 539 n.5, 135 P.3d 129, 148 n.5 (2006) (Acoba, J., concurring) (discussing criticism of the preclusive effect of existing HRAP Rule 35(c), and noting that contrastingly the then-proposed Federal Rules of Appellate Procedure (FRAP) Rule 32.1 would require the federal courts to permit citation to federal judicial opinions, order, judgments, or other written dispositions that have been . . . designated as unpublished, non-precedential, not precedent or the like (citations and brackets omitted)). An arbitrary cut-off date of July 1, 2008 would preclude citation to the very decisions that prompted the proposal before us.

The proposed amendment is unusual in its lack of retroactive effect for past unpublished opinions. Most federal circuits that have adopted FRAP Rule 32.1, including the First, Third, Fifth, Sixth, Tenth, and Eleventh Circuits, permit the

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Citation Permitted by Proposed Federal Rule of Appellate Procedure 32.1, 44 Washburn L.J. 105, 107 (2004), (stating that copies of all [federal court] opinions are always available with the clerk of the court, and most circuits are now providing their unpublished opinions to different internet databases, most notably Lexis and Westlaw[] (citing Dean A. Morande, Publication Plans in the United States Courts of Appeals: The Unattainable Paradigm, 31 Fla. St. U. L. Rev. 751, 754 (2004))). In Hawaii, the Hawaii State Judiciary website provides public access to all final dispositions from the Hawaii Supreme Court and the Hawaii Intermediate Court of Appeals that are not confidential, including memorandum opinions and summary disposition orders as of January 1998. These dispositions are apparently also displayed on Lexis and, to a certain extent, on Westlaw.

citation of unpublished opinions issued before the January 1, 2007 date permitting citation to such opinions. See Robert Timothy Reagan, Citing Unpublished Federal Appellate Opinions Issued Before 2007, Federal Judicial Center, March 9, 2007, available at http://http://www.uscourts.gov/rules/Unpub_Opinions.pdf (providing a summary table of the federal courts of appeals local rules on citations to their unpublished opinions issued before 2007). Three other circuits, the Fourth, Eighth, and Federal Circuits, discourage the citation to unpublished opinions issued before 2007, but still generally permit it when there is no published authority on point. See id. Only three circuits, the Second, Seventh, and Ninth Circuits, expressly prohibit the citations to their unpublished opinions issued before 2007 in unrelated cases. See id.

For more than a decade much of the appellate opinions in this State was rendered through summary disposition orders and memorandum opinions. Thus, we should not limit the application of the Hawai i proposal only to those unpublished dispositions issued after July 1, 2008, inasmuch as a substantial body of unpublished dispositions already exists, and many of the dispositions contain helpful discussions of the law in a variety of areas. It is the cogency, materiality, and relevance of an unpublished disposition that justifies citation to the opinion for persuasive value, not the opinion s filing date. To enact

such a cutoff date effectively suppresses use of an extensive official judicial body of law.