

December 20, 2002 meeting. In addition to court and court staff members, the HRAP committee is composed of active appellate practitioners. The practitioner members include private attorneys who represent civil plaintiffs and defendants, private attorneys who represent criminal defendants, a member from the attorney general's office, a member from the Honolulu prosecutor's office, and a member from the public defender's office.

The active practitioners expressed opposition to the proposal. The consensus of the committee, after thorough discussion, is that the proposal should not be considered further. The committee's concerns with the proposal are summarized below.

Lack of Access

The committee is concerned that allowing citation to memorandum and summary dispositions will place upon appellate practitioners a research burden that is greater than any benefit derived from allowing citation to memorandum opinions and summary disposition orders. Committee members noted there is no good search engine for law that will allow organized research into cases that are not in the Lexis or Westlaw databases. Committee members indicated it would be very difficult to find and research memorandum opinions and summary disposition orders, particularly the old ones.

Lack of Value

Committee members noted that the memorandum opinions and summary disposition orders were not and are not written with citation in mind, were and are not meant to be authority or otherwise guide parties to cases, and contain insufficient detail to warrant greater status. One member of the committee noted that discussions with prior justices has led him to the conclusion that memorandum opinions and summary disposition orders reflect only the court's result; that is,

that memorandum opinions and summary disposition orders are indicative of only the drafter's rationale, not the court's rationale, and they should not be elevated to greater status. The committee member understood that justices and judges will sometimes sign an unpublished disposition because they believe the result is correct, but will not agree to publish because they think the rationale is incorrect. Some members believed attorneys should never rely on memorandum opinions and summary disposition orders for any kind of guidance or predictor of future court action. Other members noted that the citations and rationale of a memorandum or summary disposition may be used by citing the authorities cited in the memorandum or summary disposition, without actually citing the memorandum or summary disposition document.

Practitioner's Duty to Maintain Library or Knowledge or to Search Underlying Record

Committee members were worried about the extent of the research needed to adequately cite to memorandum and summary dispositions. Some members questioned whether, under the proposed rule, appellate practitioners would be obliged to keep a file or library of memorandum and summary dispositions.

Other members questioned whether appellate practitioners would be obliged to search the underlying court record to determine the extent of similarity between the unpublished disposition and the client-appellant's or client-appellee's case.

Committee members noted that such new burdens would lay most heavily on solo or small firm practitioners.

Malpractice/Ineffective Assistance Claims

Civil attorneys were concerned that the proposed rule would increase malpractice liability. Similarly, criminal defense attorneys were concerned the rule would spawn ineffective

assistance of counsel claims unless they searched for and cited every possible disposition and kept records of such searches. Criminal defense attorneys thought the rule would spawn an increase in HRPP 40 petitions.

Case Management Tool

Committee members indicated that memorandum and summary dispositions play a necessary role in the disposition of appeals and management of the appellate courts' dockets. Committee members were disinclined to endorse, as an alternative, the notion that every appellate disposition should be published.

No Distinction Between "Precedential" & "Persuasive" Value

Committee members are concerned there is no practical distinction between citing a case for precedential value and citing a case for persuasive value. Members noted that circuit and intermediate appellate courts are bound by precedent, but that courts of last resort have the power and the duty to overturn precedent when they believe the precedential case was wrongly decided. In other words, insofar as courts of last resort are concerned, all precedent is merely persuasive.

Recommendation

Some committee members thought the real concern of the bar is that appellate decisions do not always adequately explain the decision. Those committee members urge greater explanation in any kind of decision. Some members noted the appellate courts have increased the amount of explanation in summary and memorandum dispositions.

The consensus of the HRAP committee is that the AJS proposed rule is impractical and unneeded. The HRAP committee recommends that the rule not be considered further.