

210 First St SW Suite 300
Roanoke VA 24011
Post Office Box 2200
Roanoke VA 24009
www.jamlaw.net
P 540.767.2000
F 540.982.1552

JOHNSON AYERS & MATTHEWS

C O U N S E L O R S A T L A W

September 1, 2011

Roger W. Mullins, Esquire
Roger W. Mullins, P.L.L.C.
P. O. Box 647
Tazewell, Virginia 24651-0647

Re: 2011 Report of Boyd-Graves Committee on Recoverable Costs
and Attorney's Fees on Appeal

Dear Roger:

This Committee was asked to discuss the following two issues:

- (1) Should recoverable taxable costs be codified? and
- (2) Should the applicable Rules be amended to allow for the recovery of attorney's fees in a situation where a petition for appeal is granted, but the appellee substantially prevails?

ISSUE 1

The Committee quickly and unanimously concluded that recoverable costs should not be codified. Instead, we concluded that any decision regarding what costs are recoverable should be left to the discretion of the trial court based on the particular facts and circumstances before the court.

ISSUE 2

The Committee considered whether to recommend an expanded Rule to provide for the awarding of appellate attorney's fees, where such fees are available in the trial court. Currently, such appellate fees are available under Rule 1:1A and Rule 5:35 only where the Supreme Court refuses a petition for appeal; they are wholly unavailable where the Court grants a writ and affirms or reverses. This situation may frustrate the contracted for expectations of parties, and it may defeat remedial fee shifting provisions of certain statutes. The Committee notes that one threshold issue exists, Section 17.1-624 provides for a minimum award of attorney's fees (\$50.00) to a successful appellate litigant as part of costs taxable in the appellant court. Many practitioners are unaware of this provision, but it could serve as a bar to a meaningful fee petition by virtue of its res

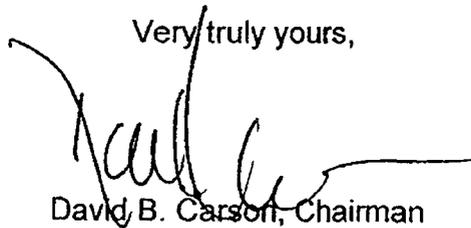
Roger W. Mullins, Esquire
September 1, 2011
Page 2

judicata effect; and opposing parties may plausibly argue that a separate fee petition under even the current Rule 1:1A is foreclosed because the Supreme Court has already awarded the appellate attorney's fees.

The Committee recommends that this topic be carried over to the 2012 Conference for further development of the concept of expanding the availability of appellate attorney's fees. The Committee anticipates exploring its likely recommendations with appellate clerks and practitioners to ascertain whether the contemplated expansion of Rule 1:1A may lead to unintended consequences.

We trust that this report is responsive to your inquires.

Very truly yours,

A handwritten signature in black ink, appearing to read "David B. Carson", with a long horizontal flourish extending to the right.

David B. Carson, Chairman

DBC:mpr

cc: Cindra M. Dowd, Esquire
The Honorable Clifford R. Weckstein
Frank Friedman, Esquire
John R. Fletcher, Esquire
The Honorable James F. Almand
Paul M. Black, Esquire
Roger T. Creager, Esquire
L. Steven Emmert, Esquire
Stephen C. Price, Esquire