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"Skin in the Game" and *Caveat Avvocati*: Monitoring the Level Playing Field on Counsel Fee Awards

By Lee Rosenberg, Editor-in-Chief

In the pendente lite and subsequent trial decision in *Sykes v. Sykes*,[1,2] New York County Supreme Court Justice Matthew F. Cooper deftly limited a less monied spouse's ability to perpetuate litigation with an unfettered blank check for counsel fees. In his use of the phrase "skin in the game"[3] to indicate the need of the less monied spouse (and, in effect, their attorneys) to have a financial risk in the litigation and its outcome, Justice Cooper has raised an issue which has now been cited in two other cases to date—one, *Westreich v. Westreich*[4] involving another pair of wealthy litigants (as in *Sykes*), the second case, *Antizzo v. Cannizzaro*[5] being on the opposite end of the spectrum. What then are the ramifications of "skin in the game" to the average middle class and less well-off litigants? And what of the attorneys and their "less monied" clients whose expectation of payment from the monied spouse is compromised?

The "even playing field" demanded by such seminal counsel fee cases as *Frankel v. Frankel*,[6] *O'Shea v. O'Shea*,[7] and *Prichep v. Prichep*,[8] and then codified by the amendments to DRL §§ 237 and 238 with a presumptive award of counsel fees to the "less monied" spouse, has never required a court to direct the dollar-for-dollar payment of all fees requested or incurred by that less monied spouse. Where the parties are wealthy, the "less monied" spouse may still have access to substantial funds so that his or her ability to retain experienced attorneys of substantial repute remains intact. The challenge has most often been in the case of less well-off litigants where fee awards—particularly in pendente lite situations where the imminent need is great—have been paltry in comparison to that need, or worse—deferred to the trial court. The latter practice was specifically decried in *Prichep.*

In the *Sykes* trial decision,[9] Justice Cooper reiterated the reasoning behind his pendente lite order,

> When, in October 2013, I rendered my decision on interim counsel fees, I expressed my concern that defendant, who was having every cent of her fees paid for by

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> plaintiff from his separate property, had insufficient incentive to limit the scope and cost of the litigation. I also was concerned that although both sides agreed that defendant would receive at least $10,000,000 [*24] in equitable distribution and had been receiving $75,000 a month in temporary support, she was being treated as if she was penniless when it came to contributing to her own litigation expenses simply because plaintiff was considered to be the monied spouse.
>
> In an attempt to rectify what I saw to be an unfair and problematic situation, I employed a term that I had often heard from members of the matrimonial bar, including the attorneys involved in this case. The term, which at this point I fear may very well end up being inscribed on my gravestone, is "skin in the game." With the goal of having both parties proceed with a financial stake in the litigation, I required defendant to use a portion of her wealth in the form of her equitable distribution award to fund her litigation from May 2013 onward. As a result, I ordered the disbursement to each side of the $1,000,000 from the marital accounts.
>
> I would like to think that what I decided in the interim fee decision had a beneficial effect on the course and scope of the litigation. Although it did not prompt a full settlement of the matter, it did narrow the issues when the parties agreed on the value of GS Gamma and to other valuations and divisions of marital property. Even more importantly, the trial concluded sooner than expected, with the large witness lists pared down to the essentials. This was not only a major victory for judicial economy, but it undoubtedly prevented already astronomical counsel fees from becoming even more so.

Ultimately at trial, Justice Cooper awarded $400,000 in fees to the wife in addition to the approximately $750,000 which the husband had already paid before the equal $1,000,000 distribution from the marital account was made. The result was that the wife was responsible for $600,000 of the $1,000,000 in fees that she previously paid counsel. She would also be responsible for the additional $200,000 she claimed was still owing to her attorneys and any additional sums which might come due.

With "skin in the game"during the course of the matter, Justice Cooper managed a complicated litigation while still not running contrary to the less recognized portion of *Prichep,* which allows the court to "consider whether either party has engaged in conduct or taken positions resulting in a delay of the proceedings or unnecessary litigation." In the pendente lite decision,[10] Justice Cooper points out,

> It bears repeating that even with the statutory presumption in favor of awarding counsel fees, the determination of an application is still a matter within the sound discretion of the trial court. (See *Lennox v. Weberman*, 109 AD3d 703 [1st Dept 2013]; *Patete,* 109 AD3d at 599.) It is not a mechanical operation whereby one side can be made to pay all of the other side's legal fees simply by virtue of having greater income, or even by having a greater overall net worth. There are other considerations that must come into play. Among the factors that need to be considered are "the equities…of each particular case."

The court in *Sykes* made its determination not to permit the wife to control the litigation based upon the facts before it.

> As it stands now, it is solely the husband who suffers any financial consequences as a result of the litigation going forward; the longer the case goes on, the more days of trial there are, the more the husband spends. Consequently, he has every incentive to curtail the litigation to the extent possible, even if that means accepting a settlement{**41 Misc.3d at 1069} that falls short of what he wants. The wife, on the other hand, without any "skin in the game," does not have the same incentive insofar as her litigation costs are being paid for completely by her adversary. Because that adversary is her soon-to-be ex-husband, and because the case is a divorce where feelings of animosity, betrayal and abandonment constantly lurk just below the surface, one can easily understand how the wife, perhaps against her better instincts, might find that it serves her interests on a number of levels to make the husband continue to expend copious funds on her behalf. Rather than giving the parties equal footing on a level playing field, the present arrangement "gives one of them a distinct advantage over the other." (Silverman, 304 AD2d at 48.) Ironically, given that the husband is the party who now has the "heavier wallet," it is the wife who has the "distinct advantage" because of her unfettered access to that wallet.

The question becomes, however: should the court apply "skin in the game" where there has been no conduct

on the part of the less monied spouse which would even remotely serve as a basis to anticipate obstreperous or obfuscatory conduct. That is an issue which would later arise in the *Antizzo* case out of Westchester County[11] where the parties' financial straits appears to be the polar opposite of the parties' good fortune in *Sykes* and in *Westreich v. Westreich* from Nassau County.[12,13]

In *Westreich*, decided on August 1, 2014, the wife sought to have the husband pay $2,075,800 in pendente lite fees—$850,000 in legal fees; $300,000 for the wife's forensic accountants; $115,000 for real estate appraisers utilized by the wife and an order directing the husband to reimburse the wife for counsel fees already paid at the time of her application ($651,000), and expert fees already paid ($174,800 for accountants and $35,000 for real estate appraisers). Justice Jeffrey A. Goodstein, citing to *Sykes'* "skin in the game" philosophy similarly notes that "an award of interim counsel fees ensures that the nonmonied spouse will be able to litigate the action, and do so on equal footing with the monied spouse." (See *Prichep v. Prichep*, 52 AD3d 61 [2d Dept. 2008]). "Where there is no serious dispute that one of the party's financial resources far exceed those of the other party, the latter should not be expected to exhaust all of the finite resources available to him or her in order to pay his or her attorney(s). (See *Prichep v. Prichep, supra*.)." The court, though, continues,

> However, the statutory "presumption" of interim counsel fees has been criticized for allowing the nonmonied spouses to gain an unfair advantage over supposedly "monied" spouses. While "[a wife] should not have to deplete her assets in order to have legal representation comparable to that of [her husband]" (Lennox v. Weberman, 109 AD3d 703 [1st Dept. 2013]), *the Court must avoid awards of interim counsel fees that could result in nonmonied spouses having every incentive to engage in costly litigation, regardless of necessity, because they are shielded from responsibility for the substantial majority of litigation expenses*. (See Sykes v. Sykes, 973 NYS2d 908 [Sup. Ct. NY Co. 2013]). In the instant proceeding, it is undisputed that the Husband is the monied spouse. Counsel for both parties are among the elite in their field. However, the situation here seems *not to be that the Wife needs an award to be on an equal footing with the Husband* (emphasis added).

As in *Sykes*, Mrs. Westreich had assets at her disposal as well as a support award in place by virtue of the same pendente lite order addressing fees. The court awarded the wife $250,000 in interim counsel fees, $50,000 in forensic accounting fees, and $40,000 in real estate appraiser fees, further holding:

> All payments of counsel fees and other expert fees shall be subject to reallocation at the conclusion of the trial. As the Wife continues to utilize portions of the over $2 million dollars she removed from the 237 Park Account, the Court is confident that at the conclusion of the trial, any reallocation awarded will be paid, if need be, and if warranted, through an additional distribution from the Husband's share of the parties' assets. This award of counsel and expert fees is without prejudice to future requests for additional fees from the Wife.

Given that Mrs. Westreich had taken $2,000,000 and had an additional $1,000,000 which she had transferred into her individual name prior to commencement in order to fund the litigation, the court accordingly balanced the equities to arrive at the awards given.[14] As will be later seen, other factors also come into play with regard to the billing in both *Westreich* and *Sykes*.

Converse to the wealth in the two cases discussed, the parties in *Antizzo v. Cannizzaro,* decided on March 28, 2014 by Justice Charles D. Wood, were far less fortunate. The court begins its decision quoting the heavy metal lyrics of "Adrenaline Mob" as a precursor of the court's view on the parties' deficit based lifestyle:

> You better listen up
>
> What I say
>
> You went and lived it up
>
> Now ya pay. You're gonna bite the bullet feel the bat
>
> Be begging for a heart attack.
>
> You borrowed now you can't repay
>
> Collection on your judgment day.

The parties in *Antizzo,* in a seven-year marriage at the time of trial, had two young children, one of whom had Down's Syndrome. The husband earned $85,500 and the wife did not work outside the home for several years. The wife's request for counsel fees was referred to hearing after the parties could not stipulate at the conclusion of trial.[15] The wife's fees totaled over $57,500 of which she already paid $12,350 to her counsel, leaving a balance of over $45,000. The husband's counsel fees, which included the divorce action, the short sale of the marital home, defending suits brought by American Express and foreclosure proceedings, totaled over $79,834, of which $7,500 had been paid, thus leaving over $72,000 due and owing.[16] Only the attorneys testified at the counsel fee hearing and appropriate proofs were submitted.

Justice Wood opined on the nature of matrimonial litigation:

> Matrimonial litigation in New York is expensive. It has been repeatedly recognized that in a fiercely contested case, the costs of the litigation can consume the marital

estate of even an affluent couple" (*Charpie v. Charpie*, 271 AD2d 169, 170171 [2d Dept 2000]). "An award of an attorney's fee is designed to redress the economic disparity between the spouses, it is not intended to address a party's decision to proceed to trial rather than agree to a settlement" (*Comstock v. Comstock*, 1 AD3d 307, 308 [2d Dept 2003], citing *O'Shea v. O'Shea*, 93 NY2d 187 [1999]). However, in determining whether and how much a court should award in attorney's fees, DRL 237(a) makes it clear that the court must take into account "the circumstances of the case and of the respective parties." *Here, as in most matrimonial cases, the parties themselves are in the best position to establish what limits must be self-imposed when incurring attorney's fees. Why? Because it is their life. Parties live together. They budget. They spend. They observe. Generally speaking, they know or should know what the basic overall financial picture of their marriage is—based upon firsthand knowledge, and based upon the Statement(s) of Net Worth and documents provided through discovery* (emphasis added).

The court, still considering the equities, the trial award, the husband's greater income and earning potential, but greater debt, and "skin in the game," awarded the wife only $3,500 in counsel fees.

> ...the court must also consider the overall financial picture of the parties. Counsel for the husband accurately points out that from the financial perspective of the parties and counsel, "This case was a loser all around." The parties are, and were at all times of limited means and minimal assets. In this case, counsel for both sides ably and professionally represented their clients, and earned their fees for their professional services. Could they have worked harder to avoid a trial? Perhaps. *But ultimately, it is a litigant's responsibility to be aware of and recognize when the fees are growing beyond what the case merits or a level that they can reasonably afford. That recognition came entirely too late to these litigants, as they each amassed attorneys' fees far in excess of what their marital assets and lifestyle were, and what reasonable expectations should have warranted.[FN1] Neither of them have a cash business or a huge trust fund. While they rarely agree, they jointly made the decision to squander the assets they had on attorneys and to go into significant debt. It is only appropriate that each of them have a "skin in the game" and share the cost of this litigation (See Sykes v. Sykes,* 41 Misc.3d 1061 [New York Co. 2013]). (emphasis added).

So, in *Antizzo*, it is the parties' inability or unwillingness to settle while in a relatively precarious financial state, and not a wealth of assets or objective bad behavior, which has triggered the use of "skin in the game" to limit the wife to an award of $3,500 in counsel fees. Simultaneously, her attorney is also on the losing end despite the court's finding that "counsel for both sides ably and professionally represented their clients, and earned their fees for their professional services."

It would seem that this application of "skin in the game" has then placed the mandate of a level playing field at the edge of an unintended precipice, falling to the rocky seas below, and with the body of counsel ready to be dredged from the depths. It is a dangerous path to follow. Less-monied litigants of more limited means who have done no wrong will not have the intended benefit of DRL § 237 nor of *Prichep* and *Frankel*. Nowhere in *Sykes* in its use of "skin in the game" does it offer that phrase as a penalty for legitimately prosecuting one's right to proceed, defend, or be heard at trial. In both *Sykes* and *Westreich*, the court cautioned against the non-monied spouse's demonstrated ability to misuse the award, particularly where they have additional funds at their disposal. That circumstance does not appear to have existed in *Antizzo*. Further, in *Sykes* and *Westreich*, "skin in the game" was applied pendente lite. In *Antizzo*, the game was over, so presumptively the wife had her skin in it throughout the litigation since counsel fees were determined post-trial.

The amendments to DRL § 237 following the level playing field cases was designed to allow the less-monied spouse to be able to hire competent and experienced counsel. In *Antizzo*, experienced counsel is now most likely out of luck in being compensated for doing an able and professional job and earning the fees charged. What message is then sent in this regard and how quickly must counsel place him or herself at odds with the client when the bill is not paid and no field-leveling fee award is in sight? Should experienced counsel not take the case in the first place? Should counsel make a mid-stream application to withdraw as counsel for non-payment, leaving the court with another self represented litigant instead of remaining in a state of servitude? A conflict is most certainly created with the client as it is unfair to require counsel to proceed without the ability to be paid for their professional services. A further conflict is also ripe for exploration, albeit in a different vein, in both *Sykes* and *Westreich*.

In *Sykes*—even where the husband was previously found in violation of the "automatic orders"[17] restrictions against transfer of assets including his use of $3,795,000 in liquid marital funds to purchase a house in Connecticut—the court critiqued the billing practices of the wife's attorneys in terms of hours spent, hourly rates, and multiple attorneys simultaneously handling similar aspects of the

matters. A similar critique of different counsel is also made part of the Nassau County decision in the *Westreich* case.[18]

In high-net-worth cases where a litigant hires well-known and elite counsel and signs a retainer agreement replete with Matrimonial Rules[19] compliant provisions, the application of "skin in the game" (which reduces the less monied spouse's ability to obtain as much in counsel fees from the other as was billed for and requested) should also be a warning to counsel. That warning, though, is not limited to elite counsel, but applies as well to all. The court's critique of billing practices, although presumably authorized by the client, affects counsel's ability to recover the unpaid fees from their own client. As we all know, even warring spouses battling to near death on every issue can usually find common ground on how to avoid paying their own attorneys.

As legal fees must be deemed reasonable by the court and "not excessive"[20] lawyers must, of course, be circumspect in their billing practices even where the client has explicitly agreed to those practices. Otherwise, the client (and the adverse spouse) might not be charged with payment of those fees, just as non-substantial compliance with the Matrimonial Rules will also preclude such recovery. Counsel accordingly must be prepared to address the now complaining client who asked for every stone to be lifted and all stops pulled against his or her spouse, but who has now been told by the court that the billing practices are excessive, he or she is charged with "skin in the game," and his or her spouse's obligation to pay same will be limited as a result.

"Skin in the game," when appropriately used, provides a valuable check against litigation abuses by the less monied spouse. Its application does, however, have a number of other consequences for litigants and also for counsel—caveat avvocati.

Endnotes

1. 41 Misc.3d 1061 (Sup Court NY County 2013).
2. 43 Misc.3d 1220(A) (Sup Court NY County 2014).
3. *See* William Safire, *On Language,* "Skin in the Game," New York Times (September 17, 2006).
4. 44 Misc.3d 1217(A).
5. 43 Misc.3d 1204(A).
6. 2 N.Y.3d 601 (2004).
7. 93 N.Y.2d 187 (1999).
8. 52 A.D.3d 61 (2nd Dept 2008).
9. Endnote 2.
10. Endnote 1.
11. Endnote 5.
12. Endnote 4.
13. As an example of the parties' wealth and lifestyle in *Westreich*, the court offered the following: "It is safe to describe the parties' lifestyle, as one of extreme excess. Prior to purchasing their home in the Hamptons, they rented a home each summer costing approximately $100,000 dollars, until they purchased a home in 2008 for $4.262 million dollars, plus expending an additional $500,000 dollars in improvements. While in the Hamptons, they employed the same housekeepers as they had at the Old Westbury residence [FN7] . The Wife explains that they had fresh flowers delivered to all of their homes, rental and owned, from local florists costing approximately $500.00 per week; they catered parties up to $20,000 each; birthday parties costing approximately $3,000; they spent $30,000 a month while in the Hamptons for entertaining, gifting and food supplies; dinners with family and friends were always paid by the parties costing [*4] approximately $1,500 per dinner; dinners at home were catered at a cost of $2,000 per month; the Children took private tennis lessons costing approximately $10,000 over the course of 4 years; they took extravagant vacations all across the world where they utilized limousines and $3,000 a night hotel rooms; they had a NetJets contract costing over $500,000 a year just to maintain the contract, and an additional $2,500 $5,000 per hour when utilizing the service; the parties always flew by private jet and traveled extensively with friends and family; Husband played golf at only the most exclusive golf resorts and clubs, many of which they are members [FN8] [FN9], and always paid for their guests; the parties made various charitable donations in the amounts of $150,000 to Long Island Jewish Medical Center, $75,000 for Women's Health and $25,000 to Mt. Sinai Hospital, to name a few; they attended Prince Charles' 60th birthday party at Buckingham Palace; spent over $100,000 a month for clothing, and holiday vacations costing $40,000–$45,000 each. There was no limitation to the parties' spending."
14. Mr. Westreich is also accused of engaging in suspect behavior. In addition to pendente lite relief, the court's order also addresses applications for contempt, restraining orders, and receivership.
15. After trial, the court "equitably" divided the assets and support was ordered for the wife and children to be paid by the husband.
16. It is not clear how the "non-matrimonial action"-related fees were addressed.
17. DRL § 236(B)(2)(b) and 22 NYCRR § 202.16a.
18. Billing was also critiqued in another Nassau County case, *MI. S v. MA. S.*, NYLJ 1202646902432, at *1 (Sup Court Nassau County, decided February 14, 2014, Bennett, J.).
19. 22 NYCRR Part 1400, et seq.
20. Rules of Professional Conduct, Rule 1.5, *Fees and Division of Fees.*

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