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As of: Jun 26, 2013

ROBERT SIMMS v. PENNY Q. SEAMAN ET AL.

SC 18839

SUPREME COURT OF CONNECTICUT

308 Conn. 523*; *2013 Conn. LEXIS 157

September 19, 2012, Argued
May 21, 2013, Officially Released

PRIOR HISTORY: [**1]

Action to recover damages for fraud and intentional infliction of emotional distress, and for other relief, brought to the Superior Court in the judicial district of New Haven, where the court, Holden, J., granted the plaintiff's motion to add Donna Simms as a defendant; thereafter, the court Blue, J., granted the motions filed by the named defendant et al. to strike counts one through six of the revised complaint; subsequently, the court, Silbert, J., granted the motions for judgment filed by the named defendant et al. and rendered judgment thereon, from which the plaintiff appealed to the Appellate Court, Bear and Stoughton, Js., with Bishop, J., dissenting, which affirmed the trial court's judgment, and the plaintiff, on the granting of certification, appealed to this court.
Simms v. Seaman, 129 Conn. App. 651, 23 A.3d 1, 2011 Conn. App. LEXIS 359 (2011)

DISPOSITION: Affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff former husband appealed a judgment of the Appellate Court (Connecticut), which affirmed a trial court decision that struck various claims, and then granted motions for judgment by defendants, the former wife and her former attorneys. The husband had alleged fraud and intentional infliction of emotional distress (IIED) due to a failure to disclose the wife's true financial situation during the parties' post-dissolution proceedings.

OVERVIEW: The parties were divorced and thereafter, the wife sought to modify an alimony award. In a separate, subsequent action, the husband brought suit against the wife and her attorneys, alleging that they knew that the wife had become the beneficiary of a substantial bequest but nonetheless, they had represented that she was economically disadvantaged in the alimony modification proceeding. The trial court granted the attorneys' motion to strike claims that were directed toward them based on the finding that the claims were barred by the common-law litigation privilege (LP). The appellate court affirmed that decision, holding that the attorneys were immune from liability based on the LP. Upon the granting of certification to appeal further, the court held that the attorneys were protected by the LP

from claims of fraud that arose from their conduct during judicial proceedings. The court carefully reviewed precedents, rationale for applying the LP to fraud claims, and other reasoning in reaching its determination. Further, the IIED claim was properly rejected, as it was derivative of the fraud claim. Accordingly, the LP also protected the attorneys from liability in that regard.

OUTCOME: The court affirmed the judgment of the appellate court.

SYLLABUS

The plaintiff sought damages from the defendants, the plaintiff's former spouse, S, and her former attorneys, for fraud and intentional infliction of emotional distress arising out of the failure of the defendant attorneys to disclose S's true financial situation during the course of postdissolution proceedings in which the plaintiff sought to modify an alimony award. The plaintiff alleged that, although [**2] the attorneys knew that S had become the beneficiary of a substantial bequest, they had represented during those proceedings that she was economically disadvantaged. The trial court granted the motion filed by the defendant attorneys to strike the counts of the complaint that were directed toward them and thereafter rendered judgment in their favor, concluding that the plaintiff's claims were barred by the common-law litigation privilege, which affords attorneys immunity from liability for certain statements or conduct during judicial proceedings. The Appellate Court affirmed the trial court's judgment, concluding that the defendant attorneys were immune from liability for their alleged misstatements and omissions because the essential elements and burdens of proof required for claims of fraud and intentional infliction of emotional distress did not provide sufficient, built-in restraints to prevent unwarranted litigation while simultaneously encouraging attorneys to provide full and robust representation and undivided loyalty to their clients. On the granting of certification, the plaintiff appealed to this court. *Held*:

1. The Appellate Court correctly determined that the defendant [**3] attorneys were protected by the litigation privilege against claims of fraud stemming from their conduct during judicial proceedings: in recognizing well established precedent shielding attorneys from liability for defamatory statements made during the course of judicial proceedings, this court concluded that the litigation privilege extended to fraudulent conduct by attorneys during judicial proceedings, reasoning that such conduct by attorneys, although strongly discouraged, does not subvert the underlying purpose of a judicial proceeding, that claims of fraud are similar in essential respects to claims of defamation, that an attorney's fraudulent conduct may be adequately addressed by remedies other than civil liability, such as a motion to open the judgment, the filing of a grievance, or a court-imposed sanction, and that federal courts, including the United States Supreme Court and the Second Circuit Court of Appeals, also have applied the litigation privilege to fraudulent conduct for exactly the same reasons that they have applied the privilege to defamatory statements.

2. The Appellate Court properly rejected the plaintiff's claim of intentional infliction of emotional distress, [**4] that claim having been derivative of the plaintiff's claim of fraud, and, therefore, the litigation privilege also shielded the defendant attorneys from liability for that claim.

COUNSEL: John R. Williams, for the appellant (plaintiff).

Patrick M. Noonan, with whom were William H. Prout, Jr., and, on the brief, Matthew H. Geelan, for the appellee (named defendant).

Nadine M. Pare, for the appellees (defendant Kenneth J. Bartschi et al.).

Raymond J. Plouffe, Jr., for the appellee (defendant Susan A. Moch).

Arnold H. Rutkin and Alexander J. Cuda filed a brief for the Connecticut Chapter of the American Academy of Matrimonial Lawyers as amicus curiae.

JUDGES: Rogers, C. J., and Norcott, Palmer, Zarella, Eveleigh and Vertefeuille, Js. ZARELLA, J. In this opinion ROGERS, C. J., and NORCOTT and VERTEFEUILLE, Js., concurred. EVELEIGH, J., concurring. PALMER, J., dissenting.

OPINION BY: ZARELLA

OPINION

[*525] ZARELLA, J. The principal issue in this

appeal is whether attorneys are protected by the common-law doctrine of absolute immunity[1] against claims of fraud and intentional infliction of emotional distress[2] arising out of their conduct during judicial proceedings.[3] The plaintiff, Robert Simms, appeals from the judgment of the Appellate Court [**5] affirming the judgment of the trial court rendered in favor of the defendants Penny Q. Seaman, Susan A. Moch, Kenneth J. Bartschi, Brendon [*526] P. Levesque and Karen L. Dowd.[4] The plaintiff claims that his former spouse, Donna Simms, and the defendants, her former attorneys, are liable for fraud and intentional infliction of emotional distress because they failed to disclose her true financial situation during postdissolution proceedings in which the plaintiff sought modification of the alimony award. The defendants counter that the conduct of attorneys during judicial proceedings is absolutely privileged. They further contend, as alternative grounds for affirmance, that the plaintiff's complaint fails to state a cause of action for fraud or intentional infliction of emotional distress. We affirm the judgment of the Appellate Court.

1 The terms "absolute immunity" and "litigation privilege" are used interchangeably throughout this opinion. See, e.g., R. Burke, "Privileges and Immunities in American Law," 31 S.D. L. Rev. 1, 2 (1985) (defining "privilege" as "a special favor, advantage, recognition or status" and "immunity" as "a special exemption from all or some portion of the legal process [**6] and its judgment").

2 The plaintiff acknowledged at the close of oral argument that his claim of intentional infliction of emotional distress is derivative of his claim of fraud and should be considered only if his claim of fraud is allowed.

3 It is undisputed that the conduct in question took place during judicial proceedings.

4 The plaintiff's former spouse, Donna Simms, also is a defendant. We refer to Seaman, Moch, Bartschi, Levesque and Dowd collectively as the defendants throughout this opinion.

The following facts and procedural history are set forth in the Appellate Court's opinion. "The plaintiff and Donna Simms were married from 1961 until 1979, when they divorced, and the plaintiff was ordered to pay periodic alimony. The plaintiff filed a motion to modify the alimony payments on November 29, 2004, which was granted by the court [on October 25, 2005]. Donna Simms appealed from that judgment [on November 10, 2005], and, on August 14, 2007, [this] [c]ourt reversed the judgment and remanded the case to the trial court for further proceedings. *Simms v. Simms, 283 Conn. 494, 510, 927 A.2d 894 (2007)*.

"From late 2005 until approximately August 14, 2007, Bartschi, Levesque and Dowd represented [**7] Donna Simms in her appeal to [this] [c]ourt.

"Moch represented Donna Simms during the years 2006 and 2007.[5] During that time, Moch filed at least [*527] one motion for pendente lite counsel fees in the Superior Court on behalf of Donna Simms. Seaman represented Donna Simms in the Superior Court from approximately March, 2007, until October 17, 2008. All defendants failed to disclose the true financial circumstances of Donna Simms.

5 The complaint contains no information as to who represented Donna Simms during the initial proceeding in the trial court, which commenced with the plaintiff's filing of the motion on November 29, 2004, and ended with the issuance of the trial court's memorandum of decision on October 25, 2005.

"Throughout the periods that the defendants represented Donna Simms, they affirmatively represented to the Superior Court and to [this] [c]ourt that Donna Simms 'was in highly disadvantaged economic circumstances' and that the plaintiff should 'be compelled to pay substantial sums of money to Donna Simms for her necessary support and maintenance.' The defendants made such representations despite [allegedly] knowing that Donna Simms had become the beneficiary of a substantial [**8] bequest from her uncle, Albert Whittington Hogeland.[6] In June, 2006, Donna Simms received approximately $310,000 from Hogeland's estate, and, in February, 2008, she received another $49,000. Despite the defendants' affirmative obligation to disclose these assets to the courts, they [allegedly] intentionally concealed this information until, under orders from the trial court, Seaman, on May 27, 2008, finally disclosed the information [when updated financial affidavits were required].

6 The plaintiff's complaint alleges that Hogeland died on January 14, 2005. The trial court's memorandum of decision dated October 17, 2008, notes that Donna Simms was informed that she was a beneficiary of his $1,662,407 estate in a

letter dated July 13, 2005, but that the letter did not indicate what portion of the estate, following its division, would go to her. In addition, there is no evidence in the record as to exactly when the defendants learned that Donna Simms was a beneficiary or whether they had acquired such knowledge before the trial court's October 25, 2005 memorandum of decision on the plaintiff's motion for modification. The complaint merely alleges that "Seaman had such knowledge no later [**9] than March, 2007 . . . Bartschi, Levesque and Dowd had such information no later than November 4, 2006 . . . [and] . . . Moch had such information on or before February 14, 2006."

"On October 17, 2008, the trial court ruled that . . . information concerning the inheritance . . . improperly [*528] had been concealed from the court and from the plaintiff.[7][According to the plaintiff, the] wrongful concealment of this financial information caused the plaintiff to incur more than $400,000 in legal expenses and other costs and expenses, including travel, medical expenses, loss of income and loss of investment value. Additionally, the plaintiff [allegedly] suffered severe emotional distress because of these events.

7 The October 17, 2008 ruling represented the trial court's final judgment on the plaintiff's November 29, 2004 motion for modification of alimony.

"[On the basis of these allegations, the] plaintiff filed an amended complaint in the Superior Court on June 19, 2009.[8] Counts one and four were brought against Seaman for fraud and intentional infliction of emotional distress, respectively. Counts two and five were brought against Moch for fraud and intentional infliction of emotional distress, [**10] respectively. Counts three and six were brought against Bartschi, Levesque and Dowd for fraud and intentional infliction of emotional distress, respectively.[9] The defendants filed motions to strike these counts of the complaint on the ground of absolute immunity or privilege and on the alternative ground of failure to state a claim. The court, concluding that such claims against attorneys for conduct that occurred during judicial proceedings were barred as a matter of law by the doctrine of absolute immunity [under *Petyan v. Ellis, 200 Conn. 243, 251-52, 510 A.2d 1337 (1986)],* granted the motions. The court upon motion, thereafter, rendered judgment in favor of the defendants." *Simms v. Seaman, 129 Conn. App. 651, 653-55, 23 A.3d 1 (2011).*

8 The original complaint was filed on March 31, 2009.

9 Counts seven and eight were brought against Donna Simms for intentional infliction of emotional distress and fraud, respectively. The present appeal is only from that portion of the judgment rendered in favor of the other defendants on their respective motions to strike the complaint in its entirety.

The plaintiff appealed to the Appellate Court, claiming that the trial court improperly had determined [**11] that [*529] the defendants were absolutely immune from liability for damages on grounds of fraud and intentional infliction of emotional distress. *Id., 655-66.* The defendants argued that the trial court properly had determined that the plaintiff's claims were barred by the doctrine of absolute immunity and urged, as an alternative ground for affirming the trial court's judgment, that the plaintiff's complaint had failed to state a cause of action. *Id., 656.* The Appellate Court concluded that the claims were precluded by the litigation privilege and, with one panel member dissenting, affirmed the trial court's judgment. *Id., 656, 674.* The Appellate Court applied the balancing test set forth in *Rioux v. Barry, 283 Conn. 338, 346-51, 927 A.2d 304 (2007)*; see *Simms v. Seaman, supra, 129 Conn. App. 669-72*; and concluded that the defendants' alleged misstatements and omissions were absolutely immune because the essential elements and burdens of proof required for claims of fraud and intentional infliction of emotional distress did not provide "sufficient built-in restraints to prevent unwarranted litigation while, at the same time, encouraging attorneys to provide full and robust representation [**12] of their clients and to provide such clients with their unrestricted and undivided loyalty." *Simms v. Seaman, supra, 671-72.* Thereafter, we granted the plaintiff's petition for certification to appeal, limited to the following issue: "Did the Appellate Court properly determine that claims of fraud and intentional infliction of emotional distress brought against attorneys for conduct that occurred during judicial proceedings were barred as a matter of law by the doctrine of absolute immunity?" *Simms v. Seaman, 302 Conn. 915, 27 A.3d 373 (2011).*

"The standard of review in an appeal challenging a trial court's granting of a motion to strike is well

established. A motion to strike challenges the legal sufficiency of a pleading, and, consequently, requires no factual findings by the trial court. As a result, our review [*530] of the court's ruling is plenary. . . . We take the facts to be those alleged in the [pleading] that has been stricken and we construe the [pleading] in the manner most favorable to sustaining its legal sufficiency." (Internal quotation marks omitted.) *Jarmie v. Troncale, 306 Conn. 578, 583, 50 A.3d 802 (2012)*. Additionally, whether attorneys are protected by absolute immunity [**13] for their conduct during judicial proceedings is a question of law over which our review is plenary. See, e.g., *Gambardella v. Apple Health Care, Inc., 291 Conn. 620, 628, 969 A.2d 736 (2009)*; *Alexandru v. Dowd, 79 Conn. App. 434, 439, 830 A.2d 352*, cert. denied, *266 Conn. 925, 835 A.2d 471 (2003)*; *McManus v. Sweeney, 78 Conn. App. 327, 334, 827 A.2d 708 (2003)*; see also 3 *Restatement (Second), Torts § 619 (1)*, p. 316 (1977).

The plaintiff contends that absolute immunity does not bar claims of fraud and intentional infliction of emotional distress against attorneys because those torts, like the tort of vexatious litigation, for which attorneys are not afforded such protection, have built-in safeguards against the use of litigation as a weapon to chill the vigorous advocacy expected in an adversarial system of justice. The plaintiff also argues that no previous decision of this court has granted attorneys absolute immunity for the type of fraudulent conduct alleged in the present case, which consists of omissions and misrepresentations during a court proceeding, and that nothing in the public policy of this state, as articulated in this court's decisions, precludes the imposition of [**14] liability on attorneys who engage in such misconduct.

The defendants respond that the litigation privilege extends to statements made in pleadings or other documents prepared in connection with judicial proceedings, that Connecticut courts previously have applied the doctrine of absolute immunity when claims of intentional infliction of emotional distress have been filed against attorneys, and that the courts never have suggested [*531] that other tortious claims against attorneys would not be similarly barred under the immunity doctrine. The defendants also contend that fraud claims lack sufficient, built-in safeguards to eliminate the need for absolute immunity as a means of protecting the ability of attorneys to zealously represent their clients and that court sanctions and disciplinary consequences are available to deter potentially fraudulent conduct by attorneys. We agree with the Appellate Court that the defendants are protected by the litigation privilege against the plaintiff's claims of fraud and intentional infliction of emotional distress.

I

HISTORY OF THE LITIGATION PRIVILEGE

We begin with the historical antecedents of the litigation privilege, which developed in the context of defamation [**15] claims, in order to determine whether the public policies that justify the privilege with respect to defamatory statements also justify the privilege with respect to claims of fraud and intentional infliction of emotional distress. Absolute immunity for defamatory statements made in the course of judicial proceedings has been recognized by common-law courts for many centuries and can be traced back to medieval England. T. Anenson, "Absolute Immunity from Civil Liability: Lessons for Litigation Lawyers," *31 Pepp. L. Rev. 915, 918 (2004)*. "The privilege arose soon after the Norman Conquest and the introduction of the adversary system," and has been deemed "as old as the law" itself. (Internal quotation marks omitted.) *Id., 918-19*. The rationale articulated in the earliest privilege cases was the need to bar persons accused of crimes from suing their accusers for defamation. P. Hayden, "Reconsidering the Litigator's Absolute Privilege to Defame," *54 Ohio St. L.J. 985, 1013-15 (1993)*. Thus, an English court determined in 1497 that an action for "scandalum magnatum," or slander, [*532] would not lie against a peer accused of forgery whose case was still pending because "no punishment was ever [**16] appointed for a suit in law, however it be false, and for vexation." *Beauchamps v. Croft*, 73 Eng. Rep. 639 (Q.B. 1497).

The first reported decision dismissing an action against an attorney on the ground of privilege was issued in 1606. T. Anenson, supra, *31 Pepp. L. Rev. 919*. In *Brook v. Montague*, 79 Eng. Rep. 77 (K.B. 1606), in which the defendant attorney was accused of slandering his client's adversary by stating in open court at a previous trial that the plaintiff had been convicted of a felony, the court concluded that "a counsellor in law retained hath a privilege to enforce any thing which is informed him by his client, and to give it in evidence, it being pertinent to the matter in question, and not to examine whether it be true or false . . . ." Id.

The principle was reiterated numerous times by

English courts, sometimes without regard to whether the defamatory statements were relevant to the issue in dispute. See, e.g., *Dawkins v. Lord Rokeby*, 8 L.R.-Q.B. 255, 263 (1873) ("[t]he authorities [are] clear, uniform and conclusive, that no action of libel or slander lies, whether against judges, counsel, witnesses or parties, for words written or spoken in the ordinary course of [**17] any proceeding before any court or tribunal recognized by law"); *Hodgson v. Scarlett*, 171 Eng. Rep. 362, 363 (C.P. 1817) ("[N]o action can be maintained for words spoken in judicial proceedings. . . . It is necessary to the due administration of justice, that counsel should be protected in the execution of their duty in [c]ourt; and that observations made in the due discharge of that duty should not be deemed actionable."); *Rex v. Skinner*, 98 Eng. Rep. 529, 530 (K.B. 1772) ("[N]either party, witness, counsel, jury, or [j]udge, can be put to answer, civilly or criminally, for words spoken in office. If the words spoken are opprobrious or irrelevant to [*533] the case, the [c]ourt will take notice of them as a contempt, and examine on information. If any thing of mala mens is found on such enquiry, it will be punished suitably."); *Wood v. Gunston*, 82 Eng. Rep. 863 (K.B. 1655) ("if a councellor speak scandalous words against one in defending his clyents cause, an action doth not lie against him for so doing, for it is his duty to speak for his clyent, and it shall be intended to be spoken according to his clyents instructions"); *Hugh's Case*, 80 Eng. Rep. 470 (K.B. 1621) (counsel protected because [**18] defamatory words were spoken "in his profession . . . and pertinent to the good and safety of his client, though it were not directly to the issue").

Almost 300 years after *Brook*, the privilege was described in *Munster v. Lamb*, 11 Q.B.D. 588, 599 (1883), as including all defamatory language, even if lacking in relevancy to the disputed issues or motivated by malice or misconduct. The court reasoned that "counsel has a special need to have his mind clear from all anxiety. . . . What he has to do, is to argue as best he can . . . in order to maintain the proposition which will carry with it either the protection or the remedy which he desires for his client. If amidst the difficulties of his position he were to be called upon during the heat of his argument to consider whether what he says is true or false, whether what he says is relevant or irrelevant, he would have his mind so embarrassed that he could not do the duty which he is called upon to perform. For, more than a judge, infinitely more than a witness, he wants protection on the ground of benefit to the public. The rule of law is that what is said in the course of the administration of the law, is privileged; and the reason of [**19] that rule covers a counsel even more than a judge or a witness. . . . The reason of the rule is, that a counsel, who is not malicious and who is acting bona fide, may not be in danger of having actions brought against him. If the rule of law were otherwise, the most [*534] innocent of counsel might be unrighteously harassed with suits, and therefore it is better to make the rule of law so large that an innocent counsel shall never be troubled, although by making it so large counsel are included who have been guilty of malice and misconduct. . . . With regard to counsel, the questions of malice, bona fides, and relevancy, cannot be raised; the only question is, whether what is complained of has been said in the course of the administration of the law. If that be so, the case against a counsel must be stopped at once." Id., 603-605.

Although early American courts relied on the English common-law privilege cases; see, e.g., *Hoar v. Wood, 44 Mass. (3 Met.) 193, 195, 198, 3 Metc. 193 (1841)*; *Mower v. Watson, 11 Vt. 536, 540-41 (1839)*; see also *M'Millan v. Birch, 1 Binn. 178, 184-85 (Pa. 1806)* (relying on English common law without citing cases); most courts rejected the explicit broadening of the privilege [**20] in *Munster*, which continues to be the rule in contemporary England. W. Prosser & W. Keeton, Torts (5th Ed. 1984) § 114, pp. 817-18. Thus, for example, in *Maulsby v. Reifsnider, 69 Md. 143, 14 A. 505 (1888)*, the Maryland Court of Appeals concluded that, although it could not accept the absolute and unqualified privilege laid down in *Munster* for matters not relevant to the subject of the inquiry, words relevant to matters in dispute fell "strictly within the rule of privilege and whether they were true or false, or whether they were spoken maliciously or in good faith, [were] questions altogether immaterial, [and] being privileged, no action [would] lie against the defendant." *Id., 164*.

The principle that defamatory statements by attorneys during judicial proceedings are absolutely privileged when they are pertinent and material to the controversy is now well established in American jurisprudence. The formulation of the rule in the Restatement (Second) of Torts, which has been adopted in [*535] nearly every state; T. Anenson, supra, *31 Pepp. L. Rev. 917*; provides: "An attorney at law is absolutely privileged to publish[10] defamatory matter concerning another in communications[11] preliminary to [**21] a proposed judicial proceeding, or in the

institution of, or during the course and as a part of, a judicial proceeding in which he participates as counsel, if it has some relation to the proceeding." *3 Restatement (Second), supra, § 586*, p. 247; see also W. Prosser & W. Keeton, supra, § 114, p. 817. One of the comments to *§ 586 of the Restatement (Second)* further provides that the privilege "protects the attorney from liability in an action for defamation irrespective of his purpose in publishing the defamatory matter, his belief in its truth, or even his knowledge of its falsity." *3 Restatement (Second), supra, § 586, comment (a)*, p. 247.

10 The Restatement (Second) of Torts defines "[p]ublication of defamatory matter [as] its communication intentionally or by a negligent act to one other than the person defamed." *3 Restatement (Second), supra, § 577 (1)*, p. 201.

11 The privilege applies to "all pleadings and affidavits necessary to set the judicial machinery in motion." 3 *Restatement (Second), supra, § 586, comment (a)*, p. 247; see also W. Prosser & W. Keeton, supra, § 114, p. 817 ("[t]he privilege covers anything that may be said in relation to the matter at issue, whether it be in [**22] the pleadings, in affidavits, or in open court").

Three rationales have been articulated in support of the absolute privilege. See T. Anenson, supra, *31 Pepp. L. Rev. 922*. First, and most important, it "protects the rights of clients who should not be imperiled by subjecting their legal advisors to the constant fear of lawsuits arising out of their conduct in the course of legal representation. The logic is that an attorney preparing for litigation must not be hobbled by the fear of reprisal by actions for defamation . . . which may tend to lessen [counsel's] efforts on behalf of clients." (Internal quotation marks omitted.) Id. This includes protection from intrusive inquiries into the motives behind an attorney's factual assertions; see P. Hayden, supra, *54* [*536] *Ohio St. L.J. 1004*; and, in the case of alleged omissions or the concealment of evidence, from having to resist or defend against attempts to uncover information that arguably could have been produced at trial but might be subject to the attorney-client privilege. Second, the privilege furthers "the administration of justice by preserving access to the courts. If parties could file retaliatory lawsuits and cause the removal of [**23] their adversary's counsel on that basis, the judicial process would be compromised." T. Anenson, supra, *923-24*. Third, there are remedies other than a cause of action for damages that can be imposed by the court under court rules, the court's inherent contempt powers and the potential for disciplinary proceedings through state and local bar associations. *Id., 925*. Thus, the litigation privilege for defamatory statements has been fully embraced by American courts for substantially the same reasons articulated by English courts.

II

THE LITIGATION PRIVILEGE IN CONNECTICUT

A

History

Like other jurisdictions, Connecticut has long recognized the litigation privilege. In *Blakeslee & Sons v. Carroll, 64 Conn. 223, 29 A. 473 (1894)* (*Blakeslee*), an action in slander for allegedly false and malicious testimony by a witness, the court explained: "The general rule is that defamatory words spoken upon an occasion absolutely privileged, though spoken falsely, knowingly, and with express malice, impose no liability for damages recoverable in an action in slander . . . ." *Id., 232*. Relying on English authorities, including *Munster, Dawkins*, and *Kennedy v. Hilliard*, 10 Ir. C. L. Rep. 195 (1859) (considering [**24] absolute immunity with respect to statement in affidavit by witness), the court [*537] added that the privilege "extends to judges, counsel and witnesses" participating in judicial proceedings. *Blakeslee & Sons v. Carroll, supra, 232*.

Since *Blakeslee*, this court frequently has acknowledged the privilege. See, e.g., *Hassett v. Carroll, 85 Conn. 23, 35-36, 81 A. 1013 (1911)* ("The publication of defamatory words may be under an absolute, or under a qualified or conditional, privilege. Under the former there is no liability, although the defamatory words are falsely and maliciously published. The class of absolutely privileged communications is narrow, and practically limited to legislative and judicial proceedings, and acts of [s]tate. One publishing defamatory words under a qualified or conditional privilege is only liable upon proof of express malice."); *Petyan v. Ellis, supra, 200 Conn. 245-46* ("There is a long-standing common law rule that communications uttered or published in the course of judicial proceedings are absolutely privileged so long as they are in some way pertinent to the subject of the controversy. . . . The effect of an absolute privilege is that damages cannot be recovered [**25] for a

defamatory statement even if it is published falsely and maliciously." [Citation omitted; internal quotation marks omitted.]); *Mozzochi v. Beck, 204 Conn. 490, 494-95, 529 A.2d 171 (1987)* ("we have afforded to attorneys, as officers of the court, absolute immunity from liability for allegedly defamatory communications in the course of judicial proceedings"); *Hopkins v. O'Connor, 282 Conn. 821, 830-31, 925 A.2d 1030 (2007)* ("[i]t is well settled that [defamatory] communications uttered or published in the course of judicial proceedings are absolutely privileged so long as they are in some way pertinent to the subject of the controversy" [internal quotation marks omitted]); *Rioux v. Barry, supra, 283 Conn. 344* ("[w]e consistently have held that absolute immunity bars defamation claims that arise from statements made in the course of judicial or quasi-judicial [*538] hearings"); *Gallo v. Barile, 284 Conn. 459, 465-66, 935 A.2d 103 (2007)* ("[i]t is well settled that communications uttered or published in the course of judicial proceedings are absolutely privileged [as] long as they are in some way pertinent to the subject of the controversy" [internal quotation marks omitted]).

Connecticut [**26] courts have adopted the privilege for all of the same reasons articulated by courts in other jurisdictions. In *Blakeslee*, the court explained that the privilege was "founded upon the principle that in certain cases it is advantageous for the public interest that persons should not be in any way fettered in their statements, but should speak out the whole truth, freely and fearlessly." (Internal quotation marks omitted.) *Blakeslee & Sons v. Carroll, supra, 64 Conn. 232*. The court described the privilege as being rooted in the public policy that "a judge in dealing with the matter before him, a party in preparing or resisting a legal proceeding, [or] a witness in giving evidence in a court of justice, shall do so with his mind uninfluenced by the fear of an action for defamation or a prosecution for libel." (Internal quotation marks omitted.) Id. The court also noted with approval a discussion of the privilege in *Dawkins v. Lord Rokeby*, 7 L.R.-E. & I. App. 744 (H.L. 1875), in which Lord Penzance observed that the "supposed hardship" of the rule of precluding a civil remedy in such circumstances "assumes the untruth and assumes the malice. . . . [Yet] [w]hether the statements were, in [**27] fact, untrue, and whether they were dictated by malice, are, and always will be, open questions, upon which opinions may differ, and which can only be resolved by the exercise of human judgment." (Internal quotation marks omitted.) *Blakeslee & Sons v. Carroll, supra, 233*, quoting *Dawkins v. Lord Rokeby*, supra, 7 L.R.-E. & I. App. 755-56. Lord Penzance ultimately rejected the idea of submitting such questions to the jury because of the "simple and obvious" reasons [*539] that a witness "free from malice" could be judged otherwise and that "the expense and distress of . . . harassing litigation" might cause a witness not to speak openly and freely. (Internal quotation marks omitted.) *Blakeslee & Sons v. Carroll, supra, 233*, quoting *Dawkins v. Lord Rokeby*, supra, 7 L.R.-E. & I. App. 756.

One century later, the court in *Rioux* similarly declared: "The purpose of affording absolute immunity to those who provide information in connection with judicial and quasi-judicial proceedings is that in certain situations the public interest in having people speak freely outweighs the risk that individuals will occasionally abuse the privilege by making false and malicious statements. . . . [T]he possibility [**28] of incurring the costs and inconvenience associated with defending a [retaliatory] suit might well deter a citizen with a legitimate grievance from filing a complaint. . . . Put simply, absolute immunity furthers the public policy of encouraging participation and candor in judicial and quasi-judicial proceedings. This objective would be thwarted if those persons whom the common-law doctrine was intended to protect nevertheless faced the threat of suit. In this regard, the purpose of the absolute immunity afforded participants in judicial and quasi-judicial proceedings is the same as the purpose of the sovereign immunity enjoyed by the state. . . . As a result, courts have recognized absolute immunity as a defense in certain retaliatory civil actions in order to remove this disincentive and thus encourage citizens to come forward with complaints or to testify." (Citations omitted; internal quotation marks omitted.) *Rioux v. Barry, supra, 283 Conn. 343-44*; see also *Petyan v. Ellis, supra, 200 Conn. 246* ("[t]he policy underlying the [absolute] privilege is that in certain situations the public interest in having people speak freely outweighs the risk that individuals will occasionally [**29] abuse the privilege by making [*540] false and malicious statements" [internal quotation marks omitted]).

This jurisdiction also has recognized the importance of access to the courts and the existence of remedies other than lawsuits as reasons for granting absolute immunity to attorneys for making allegedly defamatory statements. See *Mozzochi v. Beck, supra, 204 Conn. 494-95* ("[b]ecause litigants cannot have [unfettered] access [to

our courts] without being assured of the unrestricted and undivided loyalty of their own attorneys, we have afforded to attorneys, as officers of the court, absolute immunity from liability for allegedly defamatory communications in the course of judicial proceedings"); cf. *DeLaurentis v. New Haven, 220 Conn. 225, 264, 597 A.2d 807 (1991)* ("While no civil remedies can guard against lies, the oath and the fear of being charged with perjury are adequate to warrant an absolute privilege for a witness' statements. Parties or their counsel who behave outrageously are subject to punishment for contempt of the court."). Accordingly, the rationales adopted by Connecticut courts are consistent with those of other jurisdictions.

B

Scope of Privilege

In recent decades, Connecticut [**30] attorneys have tested the limits of the privilege with respect to alleged misconduct other than defamatory statements during judicial proceedings, with mixed results. In *Mozzochi*, an abuse of process case, this court determined that attorneys are not protected by absolute immunity against claims alleging the pursuit of litigation for the unlawful, ulterior purpose of inflicting injury on the plaintiff and enriching themselves and their client, despite knowledge that their client's claim lacked merit, because such conduct constituted the use of legal process in an improper manner or primarily to accomplish a purpose [*541] for which it was not designed. *Mozzochi v. Beck, supra, 204 Conn. 491-92, 494*. The court nevertheless sought to reconcile its responsibility to ensure unfettered access to the courts and to avoid a possible chilling effect on would-be litigants of justiciable issues by limiting liability to situations in which the plaintiff "can point to specific misconduct intended to cause specific injury outside of the normal contemplation of private litigation. Any other rule would ineluctably interfere with the attorney's primary duty of robust representation of the interests of his [**31] or her client." *Id., 497*; see also *Suffield Development Associates Ltd. Partnership v. National Loan Investors, L.P., 260 Conn. 766, 772-76, 802 A.2d 44 (2002)* (recognizing abuse of process claim against counsel); *DeLaurentis v. New Haven, supra, 220 Conn. 264* (same).

This court also has determined that absolute immunity does not bar claims against attorneys for vexatious litigation or malicious prosecution. With respect to vexatious litigation, the court in *Mozzochi* explained that it previously had "assumed, without discussion [in *Vandersluis v. Weil, 176 Conn. 353, 361, 407 A.2d 982 (1978)]*, that an attorney may be sued in an action for vexatious litigation, arguably because that cause of action has built-in restraints that minimize the risk of inappropriate litigation." *Mozzochi v. Beck, supra, 204 Conn. 495*. Twenty years later, the court in *Rioux* expressly permitted a claim for vexatious litigation against defendants who were not attorneys but who claimed absolute immunity as members of the state police for allegedly false statements they had made in the course of a quasi-judicial proceeding. See *Rioux v. Barry, supra, 283 Conn. 341-43, 348-49*. The court reasoned that, "whether [**32] and what form of immunity applies in any given case is a matter of policy that requires a balancing of interests"; *id., 346*; and "the fact that the tort of vexatious litigation itself employs a test [*542] that balances the need to encourage complaints against the need to protect the injured party's interests[12] counsels against a categorical or absolute immunity from a claim of vexatious litigation." *Id., 347*. The court concluded that the stringent requirements of the tort of vexatious litigation, including that the prior proceeding had terminated in the plaintiff's favor, "provide[d] adequate room for both appropriate incentives to report wrongdoing and protection of the injured party's interest in being free from unwarranted litigation. Thus, because the tort of vexatious litigation strikes the proper balance, it is unnecessary to apply an additional layer of protection to would-be litigants in the form of absolute immunity." Id. For similar reasons, this court has not barred claims against attorneys for malicious prosecution in criminal cases, which require proof of the same elements as vexatious litigation claims. See *McHale v. W.B.S. Corp., 187 Conn. 444, 447, 446 A.2d 815 (1982)* ("[a]n [**33] action for malicious prosecution against a private person requires a plaintiff to prove that: [1] the defendant initiated or procured the institution of criminal proceedings against the plaintiff; [2] the criminal proceedings have terminated in favor of the plaintiff; [3] the defendant acted without probable cause; and [4] the defendant acted with malice, primarily for a purpose other than that of bringing an offender to justice"); see also *Vandersluis v. Weil, supra, 176 Conn. 356* ("A vexatious [litigation] suit is a type of malicious prosecution action, differing principally in that it is based upon a prior civil action, whereas a malicious prosecution suit ordinarily implies a prior criminal complaint. To establish either cause of action, it is necessary [*543] to

prove want of probable cause, malice and a termination of suit in the plaintiff's favor.").

> 12 "Vexatious litigation requires a plaintiff to establish that: (1) the previous lawsuit or action was initiated or procured by the defendant against the plaintiff; (2) the defendant acted with malice, primarily for a purpose other than that of bringing an offender to justice; (3) the defendant acted without probable cause; and (4) the [**34] proceeding terminated in the plaintiff's favor." *Rioux v. Barry, supra, 283 Conn. 347*.

The court in *Rioux* concluded, however, that absolute immunity did bar the plaintiff's claim of intentional interference with contractual or beneficial relations.[13] *Rioux v. Barry, supra, 283 Conn. 350*. The court reasoned: "First, the underlying purpose of absolute immunity applies just as equally to this tort as it does to the tort of defamation. Second, this tort does not contain within it the same balancing of relevant interests that are provided in the tort of vexatious litigation. Third, the elements of intentional interference with contractual or beneficial relations do not provide the same level of protection against the chilling of a witness' testimony as do the elements of vexatious litigation. A claim for intentional interference with contractual relations requires the plaintiff to establish: (1) the existence of a contractual or beneficial relationship; (2) the defendant's knowledge of that relationship; (3) the defendant's intent to interfere with the relationship; (4) that the interference was tortious; and (5) a loss suffered by the plaintiff that was caused by the defendant's tortious [**35] conduct. . . . These elements simply do not have the same stringency as those that are the hallmark . . . of a claim for vexatious litigation. For this reason, insofar as the balancing that applies, this tort is more like defamation than vexatious litigation. Therefore, the same balancing test applies to it as applies to defamatory [*544] statements: if made in the course of a judicial or quasi-judicial proceeding, they are absolutely immune." (Citations omitted.) *Id., 350-51*.

> 13 Although the defendants in *Rioux* were state police officers who had accused the plaintiff during an internal affairs investigation of engaging in conduct that constituted, inter alia, sexual harassment; see *Rioux v. Barry, supra, 283 Conn. 341-42*; we believe that a claim of intentional interference with contractual or beneficial relations could be made with respect to communications by attorneys during judicial proceedings. See 3 R. Mallen & J. Smith, Legal Malpractice (2010) § 22:8, pp. 185-87 (courts have accepted that public policy considerations preclude claims based on legal theories other than defamation, including interference with contractual or advantageous business relationship).

Similarly, this court has [**36] found no basis for a claim of intentional infliction of emotional distress arising out of a privileged communication consisting of a defamatory statement made in the course of a quasi-judicial proceeding. See *Petyan v. Ellis, supra, 200 Conn. 245, 254*. In reaching this conclusion, the court in *Petyan* cited an amended version of § 46 of the First Restatement of Torts; see A.L.I., Restatement of the Law (Torts) § 46, p. 612 (Sup. 1948); which provided in relevant part that "[o]ne who, *without a privilege to do so*, intentionally causes severe emotional distress to another is liable (a) for such emotional distress, and (b) for bodily injury resulting from it." (Emphasis in original; internal quotation marks omitted.) *Petyan v. Ellis, supra, 254*, quoting A.L.I., supra, *§ 46*, p. 612. The court explained: "Although . . . *§ 46 [of the Restatement (Second) of Torts]* does not contain the same reference to privilege, the issue of privilege, in the context of the intentional infliction of emotional distress, is discussed in *comment (g) [of the Restatement (Second)]*: 'The conduct, although it would otherwise be extreme and outrageous, *may be privileged under the circumstances*. The actor is never [**37] liable, for example, where he has done no more than to insist upon his rights in a permissible way, even though he is well aware that such insistence is certain to cause emotional distress.' Since the defendant [in *Petyan*] had an absolute privilege to [make the statements at issue], she was exercising a legal right in a permissible fashion and cannot be held liable for the intentional infliction of emotional distress." (Emphasis added.) *Petyan v. Ellis, supra, 254-55*. In *DeLaurentis v. New Haven, supra, 220 Conn. 264*, this court further concluded that statements made in pleadings and in court cannot *independently* [*545] form the basis for a cause of action alleging intentional infliction of emotional distress.

III

APPLICATION OF THE PRIVILEGE

TO CLAIMS OF FRAUD

Against this legal backdrop, we turn to the plaintiff's contention that the defendants are not protected by the litigation privilege against a claim of fraud. We are guided by the principle that the issue of whether to recognize a common-law cause of action in fraud "is a matter of policy for the court to determine" based on competing social concerns. See *Craig v. Driscoll, 262 Conn. 312, 339, 813 A.2d 1003 (2003)*; see also *Rioux v. Barry, supra, 283 Conn. 346*. [**38] We are also mindful, in making this determination, that the law of torts generally, and the tort of fraud especially, like the tort of defamation, involve competing public policy considerations that must be thoroughly evaluated. See, e.g., *Cweklinsky v. Mobil Chemical Co., 267 Conn. 210, 216, 837 A.2d 759 (2004)*. Having completed an evaluation of these considerations and of the parties' arguments, we conclude that the Appellate Court correctly determined that attorneys are shielded by the litigation privilege from claims of fraud. We reach this conclusion because fraudulent conduct by attorneys, while strongly discouraged, (1) does not subvert the underlying *purpose* of a judicial proceeding, as does conduct constituting abuse of process and vexatious litigation, for which the privilege may not be invoked, (2) is similar in essential respects to defamatory statements, which are protected by the privilege, (3) may be adequately addressed by other available remedies, and (4) has been protected by the litigation privilege in federal courts, including the United States Supreme Court and the Second Circuit Court of Appeals, for exactly the same reasons [*546] that defamatory statements are protected. [**39] We address each point in turn.

A

Underlying Purpose of Judicial Proceedings

First, to the extent this court has barred attorneys from relying on the litigation privilege with respect to claims alleging abuse of process and vexatious litigation, those claims are distinguishable from claims alleging defamation and fraud because they challenge the underlying purpose of the litigation rather than an attorney's role as an advocate for his or her client. See *Barrett v. United States, 798 F.2d 565, 573 (2d Cir. 1986)* (articulating functional approach in concluding that "[t]he fact that [the assistant attorney general defending the state of New York in a wrongful death action] may or may not have engaged in questionable or harmful conduct during the course of his representation of the [s]tate in [the] litigation is irrelevant" and that "[t]he immunity attaches to his function, not to the manner in which he performed it"). Specifically, abuse of process claims must allege the improper use of litigation "to accomplish a purpose for which it was not designed." *Mozzochi v. Beck, supra, 204 Conn. 494*. Likewise, vexatious litigation claims must allege, inter alia, that the defendant acted primarily [**40] for a purpose other than that of bringing an offender to justice and without probable cause. E.g., *Rioux v. Barry, supra, 283 Conn. 347*. In contrast, a claim of fraud, including the claim that the defendants in the present case deliberately concealed material evidence from the plaintiff and incorrectly portrayed the plaintiff's former spouse as economically disadvantaged, does not require consideration of whether the underlying purpose of the litigation was improper but, rather, whether an attorney's conduct while representing or advocating for a client during a judicial proceeding that was brought for a proper purpose [*547] is entitled to absolute immunity. Consequently, this court's reasons for precluding use of the litigation privilege in cases alleging abuse of process and vexatious litigation have no application to claims of fraud.[14]

14 We disagree with the dissent's assertion that there is no meaningful difference between claims of fraud and claims alleging abuse of process or vexatious litigation, the latter of which are not subject to absolute immunity. The dissent contends that fraudulent conduct, like abuse of process and vexatious litigation, subverts the "underlying purpose" of [**41] a judicial proceeding and that "[a]ttorney fraud . . . is no less serious or corruptive of the judicial process than an action brought without probable cause and for an improper purpose." Footnote 4 of the dissenting opinion. The dissent, however, confuses the "purpose" for which the litigation is commenced and an attorney's conduct during the litigation proceedings. Id. Moreover, virtually all claims of misconduct during judicial proceedings, including defamation, allege some type of "serious or corruptive" effect on the judicial process, and, therefore, any attempt to assess and compare the relative degree of harm caused by different types of misconduct is not very useful in determining whether the privilege should apply in the present case. Id.

B

Similarity Between Fraud and Defamation

Second, a claim of fraud is similar to a claim of defamation. "A defamation action is based on the unprivileged communication of a false statement that tends either to harm the reputation of another by lowering him or her in the estimation of the community or to deter others from dealing or associating with him or her. 1 D. Pope, Connecticut Actions and Remedies: Tort Law (1993) § 10:03, p. 10-10." (Internal [**42] quotation marks omitted.) *Woodcock v. Journal Publishing Co., 230 Conn. 525, 553, 646 A.2d 92 (1994)* (*Berdon, J.*, concurring), cert. denied, *513 U.S. 1149, 115 S. Ct. 1098, 130 L. Ed. 2d 1066 (1995)*; see also *Daley v. Aetna Life & Casualty Co., 249 Conn. 766, 795, 734 A.2d 112 (1999)* ("[t]o prevail on a common-law defamation claim, a plaintiff must prove that the defendant published false statements about her that caused pecuniary harm"). "To establish a prima facie case of defamation, the [*548] plaintiff must demonstrate that: (1) the defendant published a defamatory statement; (2) the defamatory statement identified the plaintiff to a third person; (3) the defamatory statement was published to a third person; and (4) the plaintiff's reputation suffered injury as a result of the statement." (Internal quotation marks omitted.) *Gambardella v. Apple Health Care, Inc., supra, 291 Conn. 627-28*.

"The essential elements of an action in common law fraud . . . are that: (1) a false representation was made as a statement of fact; (2) it was untrue and known to be untrue by the party making it; (3) it was made to induce the other party to act upon it; and (4) the other party did so act upon that false [**43] representation to his injury. . . . [T]he party to whom the false representation was made [must claim] to have relied on that representation and to have suffered harm as a result of the reliance." (Internal quotation marks omitted.) *Sturm v. Harb Development, LLC, 298 Conn. 124, 142, 2 A.3d 859 (2010)*.

As indicated by this comparison, claims of defamation and fraud during a judicial proceeding contemplate allegations that a party suffered harm because of a falsehood communicated by the opponent's attorney, namely, the publication of a false statement that harms the other party's reputation in the case of defamation, and a false representation made as a statement of fact that induces the other party to act to his detriment in the case of fraud. Commentators have observed that, "because the privilege protects the *communication*, the nature of the theory [on which the challenge is based] is irrelevant." (Emphasis added.) 3 R. Mallen & J. Smith, Legal Malpractice (2010) § 22:8, pp. 185-86; accord P. Hayden, supra, *54 Ohio St. L.J. 998*. Accordingly, because the communication of a falsehood is an essential element of both defamation and fraud, the litigation privilege provides a complete defense [**44] to both [*549] causes of action. See 3 R. Mallen & J. Smith, supra, § 22:8, pp. 186-87.

Moreover, the required elements of fraud, like the required elements of defamation and interference with contractual or beneficial relations that the court discussed in *Rioux*, do not provide the same level of protection against the chilling effects of a potential lawsuit as the required elements of vexatious litigation. As we previously have observed, a claim of vexatious litigation requires proof that the plaintiff was the defendant in a prior lawsuit decided in his favor and that the lawsuit was commenced without probable cause and for an improper purpose. See, e.g., *Rioux v. Barry, supra, 283 Conn. 347*. These requirements establish a very high hurdle that minimizes the risk of inappropriate litigation while still providing an incentive to report wrongdoing, thus protecting "the injured party's interest in being free from unwarranted litigation." *Id.* The clear and convincing burden of proof required for a claim of fraud, however, is not an equivalent safeguard, and we do not agree with those who argue that this heightened standard alone would reduce the risk of retaliatory litigation to the same degree [**45] as the elements of vexatious litigation.

Claims of defamation and fraud are also similar because they are difficult to prove but easy for a dissatisfied litigant to allege. English and American authorities have explained that attorneys are entitled to absolute immunity for allegedly defamatory statements in part because of the difficulty of ascertaining their truth. Lord Penzance specifically referred to this problem in *Dawkins* when he stated with respect to the allegedly defamatory statements of a witness: "If by any process of demonstration, free from the defects of human judgment, the untruth and malice could be set above and beyond all question or doubt, there might [*550] be ground for contending that the law of the land should give damages to the injured man.

"But this is not the state of things under which this question of law has to be determined. Whether the

statements were, in fact, untrue, and whether they were dictated by malice, are, and always will be, open questions, upon which opinions may differ, and which can . . . be resolved [only] by the exercise of human judgment. And the real question is, whether it is proper on grounds of public policy to remit such questions to the [**46] judgment of a jury. The reasons against doing so are simple and obvious. A witness may be utterly free from malice, and may yet in the eyes of a jury be open to that imputation; or, again, the witness may be cleared by the jury of the imputation, and may yet have to encounter the expense and distress of a harassing litigation. With such possibilities hanging over his head, a witness cannot be expected to speak with that free and open mind which the administration of justice demands." *Dawkins v. Lord Rokeby*, supra, 7 L.R.-E. & I. App. 755-56.

The same logic applies to an attorney's evidentiary strategy and representations during a judicial proceeding. A claim of fraud requires not only that the representation be untrue, but that it was known to be untrue at the time it was made and that it was intended to induce the other party to act. E.g., *Sturm v. Harb Development, LLC, supra, 298 Conn. 142*. Yet, because opinions might differ on those questions, allowing them to be submitted to a jury could have all of the deleterious effects described in *Dawkins*, including judgments against innocent attorneys. Moreover, it would be relatively easy to file a spurious claim of fraud because attorneys [**47] must be selective in deciding what information to disclose in the course of representing their clients and a litigant could well believe that undisclosed information later discovered to have been in the attorney's possession [*551] should have been disclosed, thus giving rise to a claim of fraud based on misrepresentation. Finally, the mere possibility of such claims, which could expose attorneys to harassing and expensive litigation,[15] would be likely to inhibit their freedom in making good faith evidentiary decisions and representations and, therefore, negatively affect their ability to act as zealous advocates for their clients.[16]

15 In this case, for example, the plaintiff brought his claim against the defendants even though the financial information that the defendants allegedly withheld was ultimately made available for the court's consideration when it crafted the final modification order following the parties' submission of updated financial affidavits.

16 The problem of determining an attorney's intent in the context of possibly fraudulent conduct was illustrated in *Imbler v. Pachtman, 424 U.S. 409, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976)*. In that case, the United States Supreme Court [**48] noted that a unanimous panel of the California Supreme Court initially had rejected the habeas petitioner's claim that the prosecuting attorney knowingly used false testimony and suppressed material evidence at the petitioner's trial, but that the United States District Court, in considering a subsequent federal habeas petition based on the exact same contentions, had read the record differently and reached the opposite conclusion, which the Ninth Circuit Court of Appeals upheld. *Id., 413-15*. In deciding that the prosecuting attorney was protected by the litigation privilege against the petitioner's claim of improper conduct in a civil lawsuit that the petitioner filed following his release from custody, the United States Supreme Court emphasized that "[t]he prosecutor's possible knowledge of a witness' falsehoods [and] the materiality of evidence not revealed to the defense . . . are typical of issues with which judges struggle in actions for post-trial relief, sometimes to differing conclusions." *Id., 425*.

The dissent summarily dismisses our determination that claims of fraud and defamation are similar in many essential respects, apparently concluding that their similarities are not [**49] as important as the fact that defamation claims, unlike claims of fraud, lack a scienter requirement and that the claims have different standards of proof. See footnote 6 of the dissenting opinion. We acknowledge those differences but find that they are far outweighed by the considerations discussed at length in this opinion. Indeed, the scienter requirement in fraud cases, which makes proof so difficult and problematic, is one of the principal reasons why attorneys should be protected by the litigation privilege against the spurious claims of disgruntled parties who have lost in a prior action.

We also reject the dissent's contention that we "[understate] the gravity of the harm associated with attorney fraud," which the dissent contends is "significantly more serious than . . . defamation." Id. We make no judgment regarding the relative severity of the harm caused by

> attorney defamation versus fraud because a valid comparison cannot be made on the basis of general definitions but, rather, requires knowledge of specific facts and circumstances. In other words, an attorney's defamatory statements during trial proceedings could be equally or more damaging to an opposing party than an [**50] attorney's fraudulent withholding or concealment of a document. We thus find it more helpful to weigh and balance the competing interests and to consider the availability and effectiveness of alternative means for discouraging and punishing such misconduct than to focus on its relative severity as compared with other types of misconduct. See footnote 26 of this opinion.

[*552] C

Availability of Other Remedies

Third, safeguards other than civil liability exist to deter or preclude attorney misconduct or to provide relief from that misconduct. A dissatisfied litigant may file a motion to open the judgment; see, e.g., *Jucker v. Jucker, 190 Conn. 674, 677, 461 A.2d 1384 (1983)* ("a judgment . . . may be subsequently opened if it is shown that [it] was obtained by fraud or intentional material misrepresentation"); or may seek relief by filing a grievance against the offending attorney under the Rules of Professional Conduct, which may result in sanctions such as disbarment. See, e.g., *Rules of Professional Conduct 8.4 (3)* (it is professional misconduct for lawyer to "[e]ngage in conduct involving dishonesty, fraud, deceit or misrepresentation"); see also *Burton v. Mottolese, 267 Conn. 1, 59, 835 A.2d 998 (2003)* [**51] (upholding trial court's order disbarring plaintiff from practice of law for conduct that included misrepresentations of material fact), cert. denied, *541 U.S. 1073, 124 S. Ct. 2422, 158 L. Ed. 2d 983 (2004)*. Additionally, "[j]udges of the Superior Court possess the inherent authority to regulate attorney conduct and to discipline members of the bar." (Internal quotation marks omitted.) *Statewide Grievance Committee v. Presnick, 215 Conn. 162, 166, 575 A.2d 210 (1990)*. "In exercising their inherent supervisory authority, the judges have authorized grievance panels and reviewing committees to investigate allegations of attorney misconduct [*553] and to make determinations of probable cause. . . . Further, the judges have empowered the statewide grievance committee to file presentments in Superior Court seeking judicial sanctions against those claimed to be guilty of misconduct. . . . In carrying out these responsibilities, these bodies act as an arm of the court." (Citations omitted; internal quotation marks omitted.) *Id., 167*. Thus, for example, the Appellate Court concluded, in *Henry v. Statewide Grievance Committee, 111 Conn. App. 12, 957 A.2d 547 (2008)*, that, "given the wide variety of [**52] conduct to which *rule 8.4 (4)* [of the Rules of Professional Conduct] has been applied and the consistency with which courts have found *rule 8.4 (4)* violations on the basis of a mere misrepresentation to the court, the allegation in [that] case-a misrepresentation that induced the court to take action it otherwise would not have taken-constitute[d] conduct that [was] prejudicial to the administration of justice and [was] thus sufficient to form the basis of a violation of *rule 8.4 (4)*." *Id., 25*. The range of sanctions available to the court include those set forth in *Practice Book §§ 2-37*[17] and [*554] *2-44*,[18] and *General Statutes § 51-84*,[19] including fines, suspension and disbarment. Courts also may dismiss a case or impose lesser sanctions for perjury or contempt. See *DeLaurentis v. New Haven, supra, 220 Conn. 264*. Accordingly, a formidable array of penalties, including referrals to the statewide grievance committee for investigation into alleged misconduct, is available to courts and dissatisfied litigants who seek redress in connection with an attorney's fraudulent conduct. Indeed, we not only encourage trial courts to use these tools to protect the integrity of the judicial system but [**53] expect them to do so in appropriate circumstances. See, e.g., *State v. Fauci, 87 Conn. App. 150, 176 n.2, 865 A.2d 1191 (2005)* (encouraging trial judges, as "minister[s] of justice," to intervene and give proper curative instructions, when appropriate, to discourage future, unchecked professional misconduct by attorneys during closing arguments), aff'd, *282 Conn. 23, 917 A.2d 978 (2007)*.

> 17 *Practice Book § 2-37* provides in relevant part: "(a) A reviewing committee or the statewide grievance committee may impose one or more of the following sanctions and conditions in accordance with the provisions of *Sections 2-35* and *2-36*:
>
> "(1) reprimand;
>
> "(2) restitution;
>
> "(3) assessment of costs;

"(4) an order that the respondent return a client's file to the client;

"(5) a requirement that the respondent attend continuing legal education courses, at his or her own expense, regarding one or more areas of substantive law or law office management;

"(6) an order to submit to fee arbitration;

"(7) in any grievance complaint where there has been a finding of a violation of *Rule 1.15 of the Rules of Professional Conduct* or *Practice Book Section 2-27*, an order to submit to periodic audits and supervision of the [**54] attorney's trust accounts . . . .

"(8) with the respondent's consent, a requirement that the respondent undertake treatment, at his or her own expense, for medical, psychological or psychiatric conditions or for problems of alcohol or substance abuse. . . .

* * *

"(c) Failure of the respondent to comply with any sanction or condition imposed by the statewide grievance committee or a reviewing committee may be grounds for presentment before the superior court."

18 *Practice Book § 2-44* provides in relevant part: "The superior court may, for just cause, suspend or disbar attorneys . . . ."

19 *General Statutes § 51-84* provides: "(a) Attorneys admitted by the Superior Court shall be attorneys of all courts and shall be subject to the rules and orders of the courts before which they act.

"(b) Any such court may fine an attorney for transgressing its rules and orders an amount not exceeding one hundred dollars for any offense, and may suspend or displace an attorney for just cause."

D

Federal Precedent

Fourth, in civil rights actions filed under *42 U.S.C. § 1983*,[20] federal courts, including the United States [*555] Supreme Court and the United States Court of Appeals for the Second Circuit, have recognized [**55] absolute immunity for government attorneys; see, e.g., *Barrett v. United States, supra, 798 F.2d 571-73*; and for "virtually all acts, regardless of motivation, associated with [a federal prosecutor's] function as an advocate." *Dory v. Ryan, 25 F.3d 81, 83 (2d Cir. 1994)*. Federal decisions addressing the immunity of government attorneys and prosecutors acting as officers of the court in *§ 1983* actions are relevant to the common-law claim in this state action because, as the United States Supreme Court explained in *Briscoe v. LaHue, 460 U.S. 325, 103 S. Ct. 1108, 75 L. Ed. 2d 96 (1983)*, the litigation privilege at common law protected *all* participants in the court system, and private attorneys were treated no differently from judges, government lawyers and witnesses. See *id., 334-35*. "[A]ll persons--governmental or *otherwise*--who were integral parts of the judicial process" were afforded absolute immunity from liability because of the need to ensure "that judges, *advocates*, and witnesses can perform their respective functions without harassment or intimidation."[21](Emphasis added; internal quotation marks omitted.) *Id., 335*, quoting *Butz v. Economou, 438 U.S. 478, 512, 98 S. Ct. 2894, 57 L. Ed. 2d 895 (1978)*; [**56] see also *Loigman v. Township Committee, 185 N.J. 566, 582-83, 889 A.2d 426 (2006)* ("Like judicial, prosecutorial, and witness immunity, the litigation privilege is essential for the proper functioning of our criminal and civil justice systems and is not at odds [*556] with the history and purposes of *[42 U.S.C.] § 1983*. At common law, the litigation privilege blanketed all participants in the court system; private attorneys were treated no differently [from] judges, government lawyers, and witnesses.").[22]

20 Title *42 of the United States Code, § 1983*, provides in relevant part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . ."

21 We note that the absolute immunity from liability under *§ 1983* that applies to government attorneys under federal law includes immunity from civil [**57] actions for malicious

prosecution; see, e.g., *Yaselli v. Goff, 12 F.2d 396, 406 (2d Cir. 1926)*, aff'd mem., *275 U.S. 503, 48 S. Ct. 155, 72 L. Ed. 395 (1927)*; which is not afforded to attorneys in Connecticut, who are subject to liability for malicious prosecution; see *McHale v. W.B.S. Corp., supra, 187 Conn. 449*; and its civil counterpart, vexatious litigation. See *Vandersluis v. Weil, supra, 176 Conn. 356-57*.

22 To the extent the dissent disagrees with our "reliance on federal cases holding that . . . prosecutors . . . are entitled to absolute immunity under *42 U.S.C. § 1983*"; footnote 8 of the dissenting opinion; it disregards the fact that federal courts long ago recognized that the common-law litigation privilege protected all participants in the court system, including private attorneys. See, e.g., *Briscoe v. LaHue, supra, 460 U.S. 335*. Federal courts holding that prosecutors are entitled to absolute immunity against claims alleging the withholding or concealment of evidence, perjury or the knowing presentation of false evidence thus provide support for the conclusion that private attorneys are entitled to similar immunity against state law claims of fraud.

We are also fully aware [**58] that the absolute immunity to which the court in *Briscoe* referred in stating that immunity applies to all participants in the court system is the immunity accorded to defamatory statements. See id. We cite *Briscoe*, however, to emphasize that, to the extent the privilege has been extended more recently to protect prosecutors against claims of fraud in *§ 1983* actions, it also should be extended to protect private attorneys against similar claims because they, like prosecutors, historically have been considered integral parts of the judicial process. Id.

The dissent also claims that the reasons federal courts have given for extending the litigation privilege to prosecutors in *§ 1983* actions do not apply to private attorneys, that the United States Supreme Court never has extended to private counsel the same expansive immunity it has accorded prosecutors and that, in any event, that court has concluded that absolute immunity does not apply to the intentional misconduct of public defenders. See footnote 8 of the dissenting opinion. We disagree with this reasoning. Although federal prosecutors have a unique role in judicial proceedings; see *Imbler v. Pachtman, 424 U.S. 409, 429, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976)*; [**59] most of the reasons why federal courts have granted absolute immunity to prosecutors apply with equal force to private attorneys. See, e.g., *id., 423, 427-28* (prosecutors are afforded absolute immunity in order to ensure that they are able to discharge their duty free from concerns of unfounded lawsuits by defendants displeased with their discretionary decisions and to protect them from harassment by unfounded litigation that will cause deflection of their energies from their duties). Moreover, the United States Supreme Court never has been presented with the question of whether to extend absolute immunity to private counsel against claims of fraud during judicial proceedings by persons who were not their clients, and, insofar as the dissent cites *Tower v. Glover, 467 U.S. 914, 923, 104 S. Ct. 2820, 81 L. Ed. 2d 758 (1984)*, for the proposition that the United States Supreme Court "expressly concluded that . . . [absolute] immunity does not apply to the intentional misconduct of public defenders"; footnote 8 of the dissenting opinion; *Tower* is inapposite. The intentional misconduct at issue in *Tower* was not fraud, as defined under Connecticut law, but an alleged conspiracy between various [**60] state officials, including the trial and appellate court judges and the former attorney general of the state of Oregon, to secure the defendant's conviction in violation of his federal constitutional rights. *Tower v. Glover, supra, 916*. More importantly, the public defender in *Tower* was sued by *his own client*. See id. Accordingly, *Tower* has no relevance to the present case.

[*557] Significantly, protected conduct in *§ 1983* cases has included conduct similar to common-law fraud in Connecticut, such as the alleged misconduct in the present case. See, e.g., *Imbler v. Pachtman, 424 U.S. 409, 414-16, 431, 96 S. Ct. 984, 47 L. Ed. 2d 128* and n.34, *424 U.S. 409, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976)* (prosecutor shielded by absolute immunity from *§ 1983* action for damages when acting within scope of prosecutorial duties, even for wilful use of perjured testimony and wilful suppression of exculpatory information); *Dory v. Ryan, supra, 25 F.3d 83*

(prosecutor shielded by absolute [*558] immunity from claim that he conspired to present false evidence at criminal trial); *Daloia v. Rose, 849 F.2d 74, 75 (2d Cir.)* (prosecutor shielded by absolute immunity from claim that he knowingly presented false testimony), cert. denied, *488 U.S. 898, 109 S. Ct. 242, 102 L. Ed. 2d 231 (1988)*; [**61] *Barrett v. United States, supra, 798 F.2d 567, 573* (assistant attorney general defending state in wrongful death action shielded by absolute immunity from claim that he deliberately concealed relevant facts from plaintiff concerning death of plaintiff's decedent); *Azeez v. Keller, United States District Court, Docket No. 5:06-cv-00106, 2012 U.S. Dist. LEXIS 49198 (S.D. W. Va. April 6, 2012)* (prosecutors shielded by absolute immunity from claims that they presented false testimony and evidence in court because such fabrications in court are "intimately associated with the judicial phase of the criminal process" [internal quotation marks omitted]); *McQueen v. United States, 264 F. Sup. 2d 502, 512-13 (S.D. Tex. 2003)* (federal attorneys shielded by absolute immunity from claim that they assisted government witnesses in their giving of false or misleading testimony and in their withholding of documents and information because the attorneys' actions were taken in course of performing their "advocacy function"), aff'd, *United States Circuit Court of Appeals, 100 Fed. Appx. 964 (5th Cir. 2004)*.[23]

23 Insofar as the plaintiff cites cases from other jurisdictions in support of his contention that attorneys are not [**62] entitled to absolute immunity from claims of fraud, the cited cases are for the most part inapplicable because they involve attorney conduct that (1) did not occur during judicial proceedings; see *Mehaffy, Rider, Windholz & Wilson v. Central Bank Denver, N.A., 892 P.2d 230, 235 (Colo. 1995)*; *Rosenberg v. Cyrowski, 227 Mich. 508, 512-15, 198 N.W. 905 (1924)*; *New York Cooling Towers, Inc. v. Goidel, 10 Misc. 3d 219, 220, 222, 805 N.Y.S.2d 779 (2005)*; *Bigelow v. Brumley, 138 Ohio St. 574, 580, 37 N.E.2d 584 (1941)*; (2) constituted malicious prosecution; see *Taylor v. McNichols, 149 Idaho 826, 840, 243 P.3d 642 (2010)*; *Schunk v. Zeff & Zeff, PC, 109 Mich. App. 163, 174, 311 N.W.2d 322 (1981)*, appeal denied, *413 Mich. 924 (1982)*; (3) was alleged to be defamatory; see *Erie County Farmers' Ins. Co. v. Crecelius, 122 Ohio St. 210, 215, 8 Ohio Law Abs. 225, 171 N.E. 97 (1930)*; (4) occurred during representation of the claimant rather than the opposing party; *McGee v. Hyatt Legal Services, Inc., 813 P.2d 754, 755, 757 (Colo. App. 1990)*, cert. denied, *Colorado Supreme Court, Docket No. 90SC753, 1991 Colo. LEXIS 519 (Colo. July 29, 1991)*; or (5) was factually dissimilar from the conduct in the present case. See *Pagliara v. Johnston, Barton, Proctor & Rose, LLP, United States District Court, Docket No. 3:10-cv-00679, 2010 U.S. Dist. LEXIS 107012 (M.D. Tenn. October 6, 2010)* [**63] . For a more complete discussion of the foregoing cases and why they are distinguishable from the present case, see the majority opinion of the Appellate Court in *Simms v. Seaman, supra, 129 Conn. App. 661-64 n.9*.

Most of the cases on which the concurrence relies are likewise inapplicable because the alleged misconduct did not occur during judicial proceedings or the defendants did not claim an absolute privilege. See, e.g., *Slotkin v. Citizens Casualty Co. of New York, 614 F.2d 301, 307-309, 312-14 (2d Cir. 1979)* (misrepresentation occurred during judicial proceedings but no claim of absolute privilege raised), cert. denied, *449 U.S. 981, 101 S. Ct. 395, 101 S. Ct. 396, 66 L. Ed. 2d 243 (1980)*; *Mehaffy, Rider, Windholz & Wilson v. Central Bank Denver, N.A., 892 P.2d 230, 235 (Colo. 1995)* (claim involved conduct relating to business transaction before commencement of judicial proceedings); *New York Cooling Towers, Inc. v. Goidel, 10 Misc. 3d 219, 220, 222, 805 N.Y.S.2d 779 (2005)* (claim involved conduct relating to termination of contract before commencement of judicial proceedings). Accordingly, [**64] the privilege issue raised in the present case never was addressed in the cases on which the concurrence relies.

With respect to *Robinson v. Volkswagenwerk AG, 940 F.2d 1369, 1372-73 (10th Cir. 1991)*, the Tenth Circuit Court of Appeals concluded that, although prosecutors and government attorneys defending civil actions have been granted absolute immunity with respect to claims of fraudulent conduct during judicial proceedings, there did not appear to be an analogous common-law tradition for private attorneys, and the court did not believe that the United States Supreme Court would

extend absolute immunity without such a tradition. The United States Supreme Court, however, has stated in dictum-which the Tenth Circuit possibly overlooked-that the litigation privilege at common law protected *all* participants in the court system, including private attorneys, judges, government lawyers and witnesses. See *Briscoe v. LaHue, supra, 460 U.S. 335*.

To the extent the concurrence also relies on passages in the Restatement (Third) of the Law Governing Lawyers and a treatise on attorneys, neither passage addresses fraudulent conduct by attorneys during judicial proceedings. In his treatise, Edward [**65] M. Thornton's discussion of the litigation privilege, which does not include consideration of fraudulent conduct, is contained in chapter four; see 1 E. Thornton, Attorneys at Law (1914) §§ 75 through 76, pp. 118-22; whereas the passage on which the concurrence relies can be found in chapter fourteen, which covers liability generally. See id., § 284 et seq. Moreover, the concurrence quotes selectively from § 295 of chapter fourteen, omitting all references to the type of conduct contemplated, which does not include conduct during judicial proceedings other than abuse of process and groundless lawsuits. The entire passage provides as follows: "An attorney's liability does not end with being answerable to his client. He is also liable to third persons who have suffered injury or loss in consequence of fraudulent or tortious conduct on his part. *Thus counsel are responsible where they have occasioned loss by wrongfully stopping goods in transitu, or directing the seizure and conversion of goods on attachment proceedings, or conspiring with arbitrators to obtain an unjust award, or for advising a justice of the peace to act in violation of the law, or for abuse of process, or for bringing* [**66] *groundless suits, or for any other unauthorized act by which third persons are injured, such as falsely pretending to act with authority from the client in making an agreement whereby rights were relinquished by the third person*. But an attorney at law is not to be charged with participation in the evil intentions of his client merely because he acts as attorney for such client when charged with fraudulent intent, or when his acts have proved to be fraudulent. Where an attorney acts in good faith, and within the scope of his authority, he will be protected; but it is not necessary to show a conspiracy between the attorney and his client, since the attorney may so act under his general employment to enforce a legal claim, as to render himself alone liable for a malicious prosecution or arrest." (Emphasis altered.) Id., § 295, pp. 523-25.

Similarly, *§ 51 of the Restatement (Third) of the Law Governing Lawyers*, on which the concurrence relies, does not refer to fraudulent conduct during judicial proceedings but to an attorney's general duty of care to persons who are not clients. See 1 *Restatement (Third), The Law Governing Lawyers § 51*, pp. 356-57 (2000). The authorities on which the [**67] concurrence relies thus fail to support its assertion that an attorney may be sued for fraudulent conduct that occurs during judicial proceedings.

[*559] The rationale for granting absolute immunity to federal prosecutors is the same as that employed in justifying the litigation privilege for private attorneys in [*560] defamation actions. As the United States Supreme Court explained in *Imbler*, "[t]he public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages. Such suits could be expected with some frequency, for a defendant often will transform his resentment at being prosecuted into the ascription of improper and malicious actions to the [s]tate's advocate. . . . Further, if the prosecutor could be made to answer in court each time such a person charged him with wrongdoing, his energy and attention would be diverted from the pressing duty of enforcing the criminal law.

"Moreover, suits that survived the pleadings would pose substantial danger of liability even to the honest prosecutor. . . . Frequently acting under serious constraints of time and even information, a prosecutor [**68] inevitably makes many decisions that could engender colorable claims of constitutional deprivation. Defend-ing these decisions, often years after they were made, could impose unique and intolerable burdens upon a prosecutor responsible annually for hundreds of indictments and trials." (Citations omitted.) *Imbler v. Pachtman, supra, 424 U.S. 424-26*. The court acknowledged that absolute immunity "does leave the

genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty. But the alternative of qualifying a prosecutor's immunity would disserve the broader public interest. It would prevent the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system." *Id., 427-28*. The court agreed with Judge Learned Hand, who, in writing about prosecutorial immunity from actions for malicious prosecution, stated that, "[a]s is [*561] so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject [**69] those who try to do their duty to the constant dread of retaliation." (Internal quotation marks omitted.) *Id., 428*, quoting *Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949)* (Hand, C. J.), cert. denied, *339 U.S. 949, 70 S. Ct. 803, 94 L. Ed. 1363 (1950)*. We agree with this reasoning and further conclude that, given the attorney oath, court sanctions and the availability of other deterrents to attorney misconduct, there is no reason to believe that fraud is a serious problem requiring the entire bar to suffer the adverse consequences that would surely result from precluding application of the litigation privilege to claims of fraud.

We finally note, with respect to decisions of the federal courts, that the United States District Court for the District of Connecticut recently relied on Connecticut law in determining that a state law claim against an attorney under the Connecticut Unfair Trade Practices Act (CUTPA), *General Statutes § 42-110a et seq.*, alleging, inter alia, false and misleading statements during a debt collection proceeding, could not succeed because the attorney was protected by the common-law litigation privilege. See *Walsh v. Law Offices of Howard Lee Schiff, United* [**70] *States District Court, Docket No. 3:11-cv-1111 (SRU), 2012 U.S. Dist. LEXIS 136408 (D. Conn. September 24, 2012*). According to the complaint in *Walsh*, the attorney had "made multiple false, deceptive, and/or misleading representations in the course of litigating the [a]ction," including "fabricated documents" and a "false affidavit . . . ." (Internal quotation marks omitted.) Id. The court observed, however, that "[i]t is well settled that communications uttered or published in the course of judicial proceedings are absolutely privileged [as] long as they are in some way pertinent to the subject of the controversy . . . . [*562] The privilege applies also to statements made in pleadings or other documents prepared in connection with a court proceeding." (Internal quotation marks omitted.) *Id.*, citing *Alexandru v. Strong, 81 Conn. App. 68, 83, 837 A.2d 875*, cert. denied, *268 Conn. 906, 845 A.2d 406 (2004)*, and *Hopkins v. O'Connor, supra, 282 Conn. 838*. The court noted that, "[a]lthough few courts have considered the litigation privilege in the context of CUTPA claims, those that have had occasion to do so have upheld the application of absolute immunity." *Walsh v. Law Offices of Howard Lee Schiff, supra.* The court thus [**71] concluded that, because "all of the alleged[ly] false communications were made by an attorney in the course of the underlying lawsuit on issues pertinent to the controversy," they were protected by an absolute privilege. *Id.* This recent precedent, like other well established federal precedent, weighs in favor of applying the privilege to state law claims alleging fraud.[24]

> 24 The dissent's assertion that our reliance on *Walsh* is unwarranted, "especially" because *Walsh* did not involve "a true fraud claim"; footnote 12 of the dissenting opinion; is difficult to understand in light of the fact that the alleged misconduct in that case included "multiple false, deceptive, and/or misleading representations in the course of litigating the action," including "fabricated documents" and a "false affidavit . . . ." (Internal quotation marks omitted.) *Walsh v. Law Offices of Howard Lee Schiff, supra, United States District Court, Docket No. 3:11-cv-1111 (SRU), 2012 U.S. Dist. LEXIS 136408*.

E

Other Issues

To the extent the plaintiff, the concurrence and the Connecticut Chapter of the American Academy of Matrimonial Lawyers, which filed an amicus brief, argue that applying the litigation privilege to claims of fraud will not encourage [**72] candor and will shield misconduct, it is true that attorneys who engage in fraud during judicial proceedings will not be subject to civil actions seeking damages. Nevertheless, as both the English and [*563] American courts have stated numerous times, the privilege is not intended to protect counsel who may be motivated by a desire to gain an unfair advantage over their client's adversary from subsequent prosecution for bad behavior but, rather, to encourage robust representation of clients and to protect

the vast majority of attorneys who are innocent of wrongdoing from harassment in the form of retaliatory litigation by litigants dissatisfied with the outcome of a prior proceeding.[25] See, e.g., *Munster v. Lamb*, supra, 11 Q.B.D. 604 ("it is better to make the rule of law so large that an innocent counsel shall never be troubled, although by making it so large counsel are included who have been guilty of malice and misconduct"); see also *Gregoire v. Biddle, supra, 177 F.2d 581* ("[it is] better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation").[26] The privilege thus *encourages* candor on [*564] the part of [**73] honest attorneys, who greatly outnumber those few attorneys who choose not to abide by the rules. Furthermore, other remedies are available to deter attorneys who engage in fraudulent conduct, and there is no reason to believe that applying the privilege to claims of fraud would result in any greater abuse of the privilege than what presently occurs with respect to defamatory statements. Indeed, punishments in the form of court sanctions, disbarment and the loss of reputation for a violation of the Rules of Professional Conduct are not inconsequential, given their potential to end or substantially disable an attorney's career.

25 We thus disagree with the suggestion of the concurrence that we believe that "affording attorneys absolute immunity for knowingly making fraudulent statements during judicial proceedings would further the public policy of encouraging candor in the courtroom." The privilege is not intended to give offending attorneys immunity for making fraudulent statements but to protect the overwhelming number of innocent attorneys from unjust *claims* of fraudulent conduct.

For a similar reason, we disagree with the conclusion of the concurrence that absolute immunity should [**74] not apply to claims of fraudulent conduct because there is "no conflict between an attorney's duty to provide zealous and robust representation to his or her client, and an attorney's duty to be 'an officer of the legal system and a public citizen having special responsibility for the quality of justice.'" Rather, we believe that, if absolute immunity is not available, attorneys may feel constrained in advocating for their clients because of fears that their legitimate conduct may be *misinterpreted* as wrongful by dissatisfied parties and thus give rise to future lawsuits.

26 As Judge Learned Hand also explained in the context of a defamation action: "It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent [**75] as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation." *Gregoire v. Biddle, supra, 177 F.2d 581*. Thus, we do not believe that granting private attorneys absolute immunity against claims of fraud will encourage a lack of candor in the courtroom or allow such conduct to go unpunished. [**76] As we have made clear, our decision to grant attorneys absolute immunity against claims of fraud that allegedly occurs during judicial proceedings is based on the careful weighing and balancing of competing interests discussed in *Gregoire*, the consequences that may befall innocent attorneys if the privilege is not applied, and the fact that safeguards *other than* civil liability exist to deter, preclude or provide relief from attorney

misconduct. See part III C of this opinion. Indeed, it is because of these safeguards that we do not believe our decision will encourage or result in any greater lack of candor in the courtroom than otherwise would occur in the absence of today's decision.

We acknowledge that at least twelve jurisdictions have abrogated the litigation privilege for claims of fraud by enacting statutes for that purpose. See *Ark. Code Ann. § 16-22-310* (1999); *Cal. Civ. Code § 47* (Deering [*565] 2005); *Ind. Code Ann. § 33-43-1-8* (LexisNexis 2012); *Iowa Code Ann. § 602.10113* (West 1996); *Minn. Stat. Ann. § 481.07* (West 2002); *Mont. Code Ann. § 37-61-406* (2011); *N.Y. Jud. Law § 487* (McKinney 2005); *N.C. Gen. Stat. Ann. § 84-13* (West 2011); *N.D. Cent. Code § 27-13-08* (2006); *Okla. Stat. Ann. tit. 21, § 575* [**77] (West 2002); *S.D. Codified Laws § 16-19-34* (2004); *Wyo. Stat. Ann. § 33-5-114* (2011); see also *Matsuura v. E. I. du Pont de Nemours & Co., 102 Haw. 149, 162, 73 P.3d 687 (2003).* In contrast to these jurisdictions, the Connecticut legislature, like more than thirty-five other state legislatures, has not chosen to follow a similar path.[27] See *Petyan v. Ellis, supra, 200 Conn. 252* ("[t]here has been no abrogation, unless by statute, of the [common-law] protection of absolute privilege for communications or testimony elicited in connection with and pertinent to an ongoing judicial or quasi-judicial proceed-ing").[28]

27 To the extent the Connecticut legislature wishes to follow these other jurisdictions, it may enact such legislation if it deems that the benefits outweigh the negative consequences of eliminating the privilege with respect to claims of fraud.

28 Citing cases from eight jurisdictions, the dissent observes that other courts . . . "have rejected the view that attorneys should be granted absolute immunity for fraud committed in a judicial proceeding." Reliance on most of these cases, however, is misplaced, because one case involved a legal malpractice action by the plaintiffs against [**78] their own attorneys; *McGee v. Hyatt Legal Services, Inc., 813 P.2d 754, 756-57 (Colo. App. 1990),* cert. denied, *Colorado Supreme Court, Docket No. 90SC753, 1991 Colo. LEXIS 519 (Colo. July 29, 1991*); two cases involved claims of malicious prosecution, for which Connecticut attorneys already are subject to civil liability; *Kramer v. Midamco, Inc., United States District Court, Docket No. 1:07 CV 3164, 2009 U.S. Dist. LEXIS 96898 (N.D. Ohio October 19, 2009*) (alleging that counterclaim defendant had established sham organization to recruit professional plaintiffs to generate litigation for no legitimate legal objective, solely for purpose of generating attorney's and expert fees and causing others to incur unnecessary and unwarranted litigation expenses for benefit of targeted corporate defendants); *Clark v. Druckman, 218 W. Va. 427, 434, 624 S.E.2d 864 (2005)* (litigation privilege extends beyond communications and provides immunity from civil damages for claims arising from conduct during civil action except when "an attorney files suit without reasonable or probable cause with the intent to harm a defendant, [in which case] . . . the litigation privilege should [not] insulate him or her from liability for malicious prosecution"); and [**79] four cases are factually distinguishable. See, e.g., *Thompson v. Paul, 657 F. Sup. 2d 1113, 1115-16, 1121-22 (D. Ariz. 2009)* (construing ambiguous Arizona state law as permitting civil claim for fraudulent misrepresentation during pretrial settlement negotations to resolve lawsuit brought by plaintiff for acknowleged purpose of harassing and keeping defendant from cooperating with state and local officials conducting separate criminal investigation against plaintiff); *Taylor v. McNichols, 149 Idaho 826, 841, 243 P.3d 642 (2010)* ("[A]s a general rule, [when] an attorney is sued by the current or former adversary of his client, as a result of actions or communications that the attorney has taken or made in the course of his representation of his client in the course of litigation, the action is presumed to be barred by the litigation privilege. An exception to this general rule would occur [when] the plaintiff pleads facts sufficient to show that the attorney has engaged in independent acts, that is to say acts outside the scope of his representation of his client's interests, or has acted solely for his own interests and not his client's."); *Querner v. Rindfuss, 966 S.W.2d 661, 666 (Tex. App. 1998, pet. denied)* [**80] (noting importance of specific facts and circumstances and concluding that "[e]ach claim must be considered in light of the actions shown to have been taken" and that, "[i]f an attorney

actively engages in fraudulent conduct in furtherance of some conspiracy or otherwise, the attorney can be held liable").

Furthermore, insofar as the dissent relies on these few cases and the twelve state statutes abrogating the privilege to conclude that "the vast majority of states that have addressed the issue have declined to extend the privilege to . . . fraud," its conclusion is misleading because it is based on a lack of information regarding state legislatures that may have considered and rejected abrogation of the privilege. Furthermore, the dissent fails to indicate how many other jurisdictions, such as West Virginia; *Clark v. Druckman, supra, 218 W. Va. 434*; have recognized the privilege judicially. The only conclusion that can be drawn from the very limited information available is that twelve state legislatures have declined to extend the privilege to claims of fraud, more than thirty-five state legislatures have *not* enacted limiting legislation and that, because only a few courts appear [**81] to have addressed the issue, no valid conclusions can be reached regarding any judicial trend.

[*566] We further note that courts in many jurisdictions have followed an approach that has strengthened the litigation privilege, not abrogated it. As commentators and scholars have observed, "[a]s new tort theories have emerged, courts have not hesitated to expand the privilege to cover theories, actions, and circumstances never contemplated by those who formulated the rule in medieval England." (Internal quotation marks omitted.) P. Hayden, supra, *54 Ohio St. L.J. 998*. One objective [*567] of expanding the privilege has been "to prevent plaintiffs from subverting the purposes of the defamation privilege by bringing actions on other legal theories. . . . Thus, courts have applied the privilege to bar causes of action for, among others, intentional infliction of emotional distress; interference with contractual relationship; fraud; invasion of privacy; abuse of process; and negligent misrepresentation." Id.; see also 3 R. Mallen & J. Smith, supra, § 22:8, pp. 186-88. Another objective simply has been to recognize that the privilege should apply to other acts associated with an attorney's "function as an [**82] advocate." *Dory v. Ryan, supra, 25 F.3d 83*; see also *Abanto v. Hayt, Hayt & Landau, P.L., United States District Court, Docket No. 11-24543-CIV, 2012 U.S. Dist. LEXIS 133788 (S.D. Fla. September 19, 2012*) (litigation privilege applied to statutory cause of action under Florida Consumer Collection Practices Act); *Hahn v. United States Dept. of Commerce, United States District Court, Docket No. 11-6369 (ES), 2012 U.S. Dist. LEXIS 128327 (D.N.J. September 10, 2012*) ("broadly applicable" litigation privilege applies "to any communication [1] made in judicial or quasi-judicial proceedings; [2] by litigants or other participants authorized by law; [3] to achieve the objects of litigation; and [4] that have connection or logical relation to the action" [internal quotation marks omitted]); *Rickenbach v. Wells Fargo Bank, N.A., 635 F. Sup. 2d 389, 401-402 (D.N.J. 2009)* (litigation privilege applies to claims against attorney for negligence and breach of duty of good faith and fair dealing because privilege is "broadly applicable" and implied abrogation of privilege is not favored); *Linder v. Brown & Herrick, 189 Ariz. 398, 405-406, 943 P.2d 758 (App. 1997)* (litigation privilege applies to claims of fraud); *Echevarria, McCalla, Raymer, Barrett & Frappier v. Cole, 950 So. 2d 380, 384 (Fla. 2007)* [**83] ("the litigation privilege applies in all causes of action, whether for common-law torts or statutory violations," including alleged violations of Florida [*568] Consumer Collection Practices Act and Florida Unfair and Deceptive Trade Practices Act); *Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. United States Fire Ins. Co., 639 So. 2d 606, 608 (Fla. 1994)* (litigation privilege applies to claim of tortious interference with business relationship because "absolute immunity must be afforded to any act occurring during the course of a judicial proceeding, regardless of whether the act involves a defamatory statement or other tortious behavior . . . [as] long as the act has some relation to the proceeding"); *Bennett v. Jones, Waldo, Holbrook & McDonough, 2003 UT 9, 70 P.3d 17, 34 (Utah 2003)* (litigation privilege applies to claim of deceit when complaint alleges that attorneys made statements with intent to deceive courts).[29]

29 In a lengthy footnote, the dissent inexplicably concludes that the foregoing cases are inapposite because "they . . . do not address the question [of] . . . whether fraud claims are barred by absolute immunity." Footnote 12 of the dissenting opinion. The dissent thus [**84] suggests that these cases are intended to demonstrate that other jurisdictions have determined that the litigation privilege applies to claims of fraud. As the text of this opinion makes clear, however, we rely on the

cases to emphasize that courts in other jurisdictions have generally strengthened the litigation privilege by extending it to *other* causes of action arising from an attorney's function as an advocate. We do not cite these cases for the proposition that courts in other jurisdictions have determined that claims of fraud are barred by absolute immunity.

We finally observe that abrogation of the litigation privilege to permit claims of fraud could open the floodgates to a wave of litigation in this state's courts challenging an attorney's representation, especially in fore-closure and marital dissolution actions in which emotions run high and there may be a strong motivation on the part of the losing party to file a retaliatory lawsuit. Abrogation of the privilege also would apply to the claims of pro se litigants who do not understand the boundaries of the adversarial process and thus could give rise to much unnecessary and harassing litigation. We therefore conclude that [**85] the Appellate Court properly [*569] determined that attorneys are protected by the litigation privilege against claims of fraud for their conduct during judicial proceedings.[30]

30 The concurrence maintains that litigants should be allowed to bring claims of fraud against attorneys for conduct during judicial proceedings following the issuance of sanctions or a disciplinary finding after a full hearing before a judge or the statewide grievance committee because a two step procedure would provide a suitable safeguard against frivolous lawsuits. The concurrence also argues that the elements of the tort of fraud provide a built-in restraint that would minimize the risk of retaliatory litigation because the burden of proof required for such claims is clear and convincing evidence. Notwithstanding these contentions, we note that attorneys would still be subject to a possibly significant increase in litigation because dissatisfied parties seeking to benefit financially may be more inclined to seek penalties from the court or the statewide grievance committee so that they may proceed with the civil action. The standard of clear and convincing evidence also is unlikely to deter frivolous litigation [**86] when the issue is subjective and difficult for even well-intentioned jurors to resolve because it requires a determination regarding the attorney's intent. See *Gregoire v. Biddle, supra, 177 F.2d 581* ("[I]t is impossible to know whether the claim is well founded until the case has been tried . . . . Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith."); *Blakeslee & Sons v. Carroll, supra, 64 Conn. 233* (noting in defamation case that "[w]hether the statements were, in fact, untrue, and whether they were dictated by malice, are, and always will be, open questions, upon which opinions may differ, and which can only be resolved by the exercise of human judgment").

For similar reasons, we reject the dissent's even lower standard, to the extent we can discern it, for allowing a civil claim of fraud to proceed against an attorney for alleged misconduct during judicial proceedings. At the outset of its opinion, the dissent states that "such claims should be permitted if the plaintiff first seeks relief in the underlying proceeding or files [**87] a grievance complaint against the offending attorney and, in connection therewith, secures either a sanction against the attorney or a finding of attorney misconduct." The dissent contends at the conclusion of its opinion, however, that a trial court's finding, as in the present case, that certain conduct was merely wrongful, without any attempt by the plaintiff to seek sanctions, a reprimand or a finding of misconduct by the statewide grievance committee, would be sufficient to permit a civil action for fraud against an attorney. We disagree with both views because the dissent fails to recognize, or even address, the compelling considerations to the contrary that we discuss herein and find persuasive.

IV

APPLICATION OF THE PRIVILEGE TO CLAIMS OF INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

In light of our conclusion in part III of this opinion, we also conclude that the Appellate Court properly [*570] rejected the plaintiff's claim of intentional infliction of emotional distress, which is derivative of his claim of fraud. Footnote 2 of this opinion; see *DeLaurentis v. New Haven, supra, 220 Conn. 264*

(attorneys protected by litigation privilege from independent action alleging intentional infliction [**88] of emotional distress due to statements made in pleadings or in court); *Petyan v. Ellis, supra, 200 Conn. 255* (claim of intentional infliction of emotional distress precluded if based on privileged conduct). Accordingly, we need not reach the defendants' alternative grounds for affirmance of the Appellate Court's judgment.[31]

> 31 The concurrence contends that parties should be allowed to file a cause of action for lost income and emotional distress because they may not be adequately compensated for their losses through the imposition of sanctions or an award of costs and attorney's fees. As we noted, however, this court previously has determined that both independent and derivative claims of intentional infliction of emotional distress are precluded under existing Connecticut law. See *DeLaurentis v. New Haven, supra, 220 Conn. 264*; *Petyan v. Ellis, supra, 200 Conn. 255*.

The judgment of the Appellate Court is affirmed.

In this opinion ROGERS, C. J., and NORCOTT and VERTEFEUILLE, Js., concurred.

CONCUR BY: EVELEIGH

CONCUR

EVELEIGH, J., concurring. I agree with the majority that the judgment of the Appellate Court should be affirmed. I write separately because, in my view, we should not have a bright line rule [**89] of absolute immunity in cases of this nature. I would require a finding of fraud or dishonesty to be made by the trial court on a motion for sanctions, or a similar finding of misconduct to be made by the statewide grievance committee pursuant [*571] to *rule 8.4 (3) of the Rules of Professional Conduct*, before allowing a separate action against an attorney. By requiring such a finding, the attorney would have an opportunity to argue and present evidence at a hearing prior to the ruling of a court or tribunal. I would not, however, allow such an action in the present case because the trial court was acting on a motion for modification of alimony and not a motion for sanctions. Given this procedural posture, the attorneys did not have an opportunity to present evidence in their own defense and the trial court did not hold a hearing. Therefore, I believe that to allow an action, in these circumstances, would be unfair to the attorneys. I can, however, envision circumstances wherein, after a finding of misconduct is made by the trial court on a motion for sanctions or by the statewide grievance committee after a disciplinary hearing, an action should be allowed against an offending attorney. [**90] It is for this reason that I respectfully concur.

I agree with the facts and procedural history set forth in the majority opinion. I also agree with the majority that "[t]he standard of review in an appeal challenging a trial court's granting of a motion to strike is well established. A motion to strike challenges the legal sufficiency of a pleading, and, consequently, requires no factual findings by the trial court. As a result, our review of the court's ruling is plenary. . . . We take the facts to be those alleged in the [pleading] that has been stricken and we construe the [pleading] in the manner most favorable to sustaining its legal sufficiency. . . . *Jarmie v. Troncale, 306 Conn. 578, 583, 50 A.3d 802 (2012)*. Additionally, whether attorneys are protected by absolute immunity for their conduct during judicial proceedings is a question of law over which our review is plenary. See, e.g., *Gambardella v. Apple Health Care, Inc., 291 Conn. 620, 628, 969 A.2d 736 (2009)*; *Alexandru v. Dowd, 79 Conn. App. 434, 439, 830 A.2d 352*, cert. [*572] denied, *266 Conn. 925, 835 A.2d 471 (2003)*; *McManus v. Sweeney, 78 Conn. App. 327, 334, 827 A.2d 708 (2003)*; see also 3 *Restatement (Second) Torts § 619 (1)*, [**91] p. 316 (1977)." (Internal quotation marks omitted.)

The question of whether to extend absolute immunity to attorneys for statements and representations made during judicial proceedings requires us to examine the public policy considerations behind absolute immunity. See *Rioux v. Barry, 283 Conn. 338, 343, 927 A.2d 304 (2007)*. The underlying public policy that is furthered by absolute immunity is to "encourag[e] participation and candor in judicial and quasi-judicial proceedings." (Internal quotation marks omitted.) *Id., 344*. Thus, affording a party absolute immunity promotes honesty and candor by protecting that party from retaliatory actions for statements made during judicial proceedings. See *Petyan v. Ellis, 200 Conn. 243, 252-53, 510 A.2d 1337 (1986)* (libel and intentional infliction of emotional distress claims against defendant for statements made to state labor department barred by absolute immunity). Absolute immunity, however, has not been conferred in every circumstance in which it has been sought. See, e.g., *Rioux v. Barry, supra, 343* (absolute immunity does not

bar vexatious litigation claim); *Mozzochi v. Beck, 204 Conn. 490, 494-95, 529 A.2d 171 (1987)* (absolute immunity [**92] does not bar claim of abuse of process against attorney if plaintiff alleges attorney engaged in specific misconduct intended to cause specific injury outside of normal contemplation of private litigation); *McHale v. W.B.S. Corp., 187 Conn. 444, 447-48, 446 A.2d 815 (1982)* (absolute immunity does not bar malicious prosecution claim). Rather, courts extend absolute immunity to a defendant only in those situations where "the public interest in having people speak freely outweighs the risk that individuals will occasionally abuse the privilege by making false and malicious statements." (Internal quotation marks omitted.) *Rioux v. Barry,* [*573] *supra, 343*. Indeed, "absolute immunity is of a 'rare and exceptional character.'" *Barrett v. United States, 798 F.2d 565, 571 (2d Cir. 1986),* quoting *Cleavinger v. Saxner, 474 U.S. 193, 202, 106 S. Ct. 496, 88 L. Ed. 2d 507 (1985)*.

In those situations where there are sufficient safeguards in place to protect the defendant from false and malicious claims, courts have declined to extend absolute immunity. For example, this court has refused to extend absolute immunity to protect a defendant from a vexatious litigation claim. In *Rioux v. Barry, supra, 283 Conn. 340-42,* [**93] the plaintiff brought claims for vexatious litigation and intentional interference with contractual relations against the defendants for allegedly making false statements in an attempt to get the plaintiff fired. In declining to attach absolute immunity to the statements that provided the basis for the tort of vexatious litigation, this court stated that the elements of the tort of vexatious litigation provide sufficient protection to defendants who make complaints or statements in good faith. *Id., 346-47*. Specifically, we noted that "[v]exatious litigation requires a plaintiff to establish that: (1) the previous lawsuit or action was initiated or procured by the defendant against the plaintiff; (2) the defendant acted with malice, primarily for a purpose other than that of bringing an offender to justice; (3) the defendant acted without probable cause; and (4) the proceeding terminated in the plaintiff's favor." *Id., 347*. If the defendants acted in good faith, therefore, a vexatious litigation claim could not succeed against them. Thus, because the "stringent requirements" of vexatious litigation provided adequate protection to defendants from retaliatory actions, this court found [**94] it "unnecessary to apply an additional layer of protection to would-be litigants in the form of absolute immunity." *Id., 347-48*. Conversely, this court did extend absolute immunity to bar the plaintiff's claims [*574] for intentional interference with contractual relations. *Id., 350*. The court concluded that, because the elements of intentional interference with contractual relations did not provide the defendants with the same level of protection as the elements of vexatious litigation, absolute immunity was necessary to protect against "the chilling of a witness' testimony." *Id., 351*.

Likewise, this court has also declined to extend absolute immunity to shield a defendant from a malicious prosecution claim. In *McHale v. W.B.S. Corp., supra, 187 Conn. 450*, this court held that the elements of malicious prosecution provide immunity to a defendant "who in good faith, volunteers false incriminating information." This court concluded that judging the truthfulness of a defendant's statements retrospectively would "have a chilling effect on the willingness of a private person to undertake any involvement in the enforcement of criminal laws." Id. This court also stated, however, that immunity would [**95] not attach to a complaining witness who knowingly gives false information to law enforcement officers, on the ground that "knowingly present[ing] . . . false information necessarily interferes with the intelligent exercise of official discretion." *Id., 449*. Thus, the court concluded that defendants who intentionally give false information to a law enforcement officer are not immune from an action for malicious prosecution, because those defendants do not need to be protected from retaliatory actions; rather, actions initiated against those defendants are meritorious and should be heard. *Id., 449-50*.

Furthermore, other jurisdictions allow an attorney to be sued for fraudulent conduct that occurs during judicial proceedings. For example, in *Slotkin v. Citizens Casualty Co. of New York, 614 F.2d 301, 304 (2d Cir. 1979),* cert. denied, *449 U.S. 981, 101 S. Ct. 395, 101 S. Ct. 396, 66 L. Ed. 2d 243 (1980),* the United States Court of Appeals for the Second Circuit Court held that attorneys are [*575] liable for fraudulent misrepresentations made during settlement negotiations. In that case, the plaintiffs brought an action against the defendant attorneys for intentionally misrepresenting the extent of the plaintiffs' [**96] insurance coverage. The court stated that "[t]he law of New York is clear that one who has been induced by fraudulent misrepresentation to settle a claim may recover damages . . . ." *Id., 312*. Thus, the fact that the defendants were attorneys did not prevent them from

being liable for their fraudulent conduct. Likewise, in *Robinson v. Volkswagenwerk AG, 940 F.2d 1369, 1373-74 (10th Cir. 1991)*, cert. denied, *502 U.S. 1091, 112 S. Ct. 1160, 117 L. Ed. 2d 408 (1992)*, the United States Court of Appeals for the Tenth Circuit held that private attorneys are not entitled to absolute immunity for fraudulent statements made during the course of discovery and litigation. In reaching this conclusion, the court in *Robinson* stated that, although attorneys are entitled to absolute immunity from defamation claims, they are not entitled to immunity for malicious prosecution. *Id., 1372*. The court then concluded that a fraud claim should be treated similarly to a malicious prosecution claim and, thus, absolute immunity was not granted to the defendants. *Id., 1372-73*; see id. (after stating that absolute immunity does not apply to malicious prosecution claims, court stated that "[w]e think a similar rule [**97] applies in this case"); see also *New York Cooling Towers, Inc. v. Goidel, 10 Misc. 3d 219, 222, 805 N.Y.S.2d 779 (2005)* (attorneys are "liable to nonclients for acts of fraud, collusion, malicious acts or other special circumstances" [internal quotation marks omitted]); *Mehaffy, Rider, Windholz & Wilson v. Central Bank, N.A., 892 P.2d 230, 235 (Colo. 1995)* ("[g]enerally, an attorney is not liable to a [nonclient] absent a finding of fraud or malicious conduct by the attorney"). In addition, Edward Thornton's treatise entitled Attorneys at Law and the Restatement (Third) of the Law Governing Lawyers [*576] state that attorneys may generally be held liable for fraud.[1]

1 Thornton on Attorneys at Law provides: "An attorney's liability does not end with being answerable to his client. He is also liable to third persons who have suffered injury or loss in consequence of fraudulent or tortious conduct on his part. . . . But an attorney at law is not to be charged with participation in the evil intentions of his client merely because he acts as attorney for such client when charged with fraudulent intent, or when his acts have proved to be fraudulent. Where an attorney acts in good faith, and within [**98] the scope of his authority, he will be protected; but it is not necessary to show a conspiracy between the attorney and his client, since the attorney may so act under his general employment to enforce a legal claim, as to render himself alone liable for a malicious prosecution or arrest." E. Thornton, Attorneys at Law (1914) § 295, pp. 523-25.

Section 51 of the Restatement (Third) of the Law Governing Lawyers provides in relevant part:

"For purposes of liability . . . a lawyer owes a duty to use care within the meaning of § 52 . . .

"(4) to a nonclient when and to the extent that:

"(a) the lawyer's client is a trustee, guardian, executor, or fiduciary acting primarily to perform similar functions for the nonclient;

"(b) the lawyer knows that appropriate action by the lawyer is necessary with respect to a matter within the scope of the representation to prevent or rectify the breach of a fiduciary duty owed by the client to the nonclient, where (i) the breach is a crime or fraud or (ii) the lawyer has assisted or is assisting in the breach;

"(c) the nonclient is not reasonably able to protect its rights; and

"(d) such a duty would not significantly impair the performance of the lawyer's obligations [**99] to the client." 1 *Restatement (Third), Law Governing Lawyers § 51* (2000).

Additionally, Connecticut courts have long emphasized the need for full and frank disclosure in matrimonial dissolution actions. This court has held that "lawyers who represent clients in matrimonial dissolutions have a special responsibility for full and fair disclosure, for a searching dialogue, about all of the facts that materially affect the client's rights and interests." *Monroe v. Monroe, 177 Conn. 173, 183, 413 A.2d 819*, cert. denied, *444 U.S. 801, 100 S. Ct. 20, 62 L. Ed. 2d 14 (1979)*. The requirement of honest disclosure also applies to the information that the litigating parties convey to the court. See *Billington v. Billington, 220 Conn. 212, 220,* [*577] *595 A.2d 1377 (1991)*; *Baker v. Baker, 187 Conn. 315, 322, 445 A.2d 912 (1982)*. In fact, this court has concluded that the disclosure required between marital parties is the same as that required between a fiduciary and a beneficiary. *Billington v. Billington, supra, 221* ("We have recognized, furthermore, in the context of an action based upon fraud, that the special relationship between fiduciary and beneficiary compels full disclosure by the fiduciary. . [**100] . . Although marital parties are not necessarily in the relationship of fiduciary to

beneficiary, we believe that no less disclosure is required of such parties when they come to court seeking to terminate their marriage." [Citation omitted.]). Therefore, requiring full and frank disclosure during litigation and allowing an aggrieved party to seek redress for injuries caused by fraudulent misrepresentations are not novel legal concepts in this state.

The majority concludes, however, that absolute immunity is needed in the present case to "protect the overwhelming number of innocent attorneys from unjust claims of fraudulent conduct." See footnote 24 of the majority opinion; I respectfully disagree. I do not believe that affording attorneys absolute immunity for knowingly making fraudulent statements during judicial proceedings would further the public policy of encouraging candor in the courtroom. To echo Judge Bishop, "logic dictates the opposite conclusion." *Simms v. Seaman, 129 Conn. App. 677, 23 A.3d 1 (2011)* (*Bishop, J.*, concurring and dissenting). Much like law enforcement officials, judges need to be presented with truthful information in order to arrive at a just and rational [**101] decision. Attorneys who knowingly and intentionally make false statements in court hinder, rather than advance, the administration of justice.[2] Thus, I would not extend [*578] absolute immunity to bar a claim of fraud based on intentional misrepresentations made during judicial proceedings because such statements significantly interfere with, and make a mockery of, the judicial process.

> 2 I respectfully disagree with the majority that absolute immunity is needed "to encourage robust representation of clients and to protect the vast majority of attorneys who are innocent of wrongdoing from harassment in the form of retaliatory litigation by litigants dissatisfied with the outcome of a prior proceeding." In my view, the overwhelming majority of attorneys who conduct themselves according to the Rules of Professional Responsibility do not need this protection. However, as the limited number of times during the course of a year that either sanctions or disciplinary actions are issued against attorneys will attest, the profession is not absolutely immune from the occasional incidence of dishonest or fraudulent conduct in the courtroom. I am receptive to the majority's concern of frivolous actions. [**102] It is for this reason that I would set a very high standard (according to Justice Palmer I have "place[d] the bar too high") before an action could be instituted. Because of my concern of frivolous actions I would require a court or disciplinary finding of fraudulent conduct before an action could be instituted.

The majority asserts that "the mere possibility of such claims, which could expose attorneys to harassing and expensive litigation, would be likely to inhibit their freedom in making good faith evidentiary decisions and representations and, therefore, negatively affect their ability to act as zealous advocates for their clients." I disagree. I see no conflict between an attorney's duty to provide zealous and robust representation to his or her client, and an attorney's duty to be "an officer of the legal system and a public citizen having special responsibility for the quality of justice." Rules of Professional Conduct, preamble. An attorney can, simultaneously, be undividedly loyal to his or her client and truthful to the court. Extending absolute immunity to situations where attorneys knowingly make fraudulent statements during judicial proceedings would, in effect, be giving [**103] attorneys a license to lie. Zealous advocacy and robust representation do not mandate such a conclusion.

The majority states that "to the extent this court has barred attorneys from relying on the litigation privilege [*579] with respect to claims alleging abuse of process and vexatious litigation, those claims are distinguishable from claims alleging defamation and fraud because they challenge the underlying purpose of the litigation rather than an attorney's role as an advocate for his or her client. See *Barrett v. United States, [supra, 798 F.2d 573*] . . . ." I disagree with this proposition. In my view, a fraudulent statement presented to the court as the foundation for an action and a fraudulent statement proffered directly to the court by an attorney during the course of litigation are equally reprehensible.

The facts of *Barrett v. United States, supra, 798 F.2d 565*, a case relied on by the majority, are distinguishable from those in the present case. *Barrett* involved a cause of action against government attorneys. The court in *Barrett* noted that "[a]bsolute immunity from liability has been accorded to a few types of government officials whose duties are deemed as a matter of public policy [**104] to require such protection to enable them to function independently and effectively, without fear or harassment." *Id., 571*. Moreover, *Barrett* did not overrule *Slotkin*, another case from the Second Circuit, which

expressly permits a cause of action against private attorneys. *Slotkin v. Citizens Casualty Co. of New York, supra, 614 F.2d 318*. Similarly, I also disagree with the majority's reliance on *42 U.S.C. § 1983* and the absolute immunity enjoyed by some government officials and attorneys. We are not dealing with the actions of government officials in this case. Therefore, the same rationale does not apply.

Rule 8.4 (3) of the Rules of Professional Conduct states that it is professional misconduct for an attorney to engage in conduct involving dishonesty, fraud, deceit or misrepresentation. The wording of this rule, however, does not limit itself to actions either before or during trial. If, after due notice and an opportunity to be heard, an attorney has violated these standards, at [*580] any stage of the proceedings, a separate cause of action should exist against that attorney. We cannot condone bad behavior at any point. I am joining the result reached in this case, however, because [**105] the attorneys herein were never afforded an opportunity to be heard and defend themselves regarding the opinion expressed by the trial court concerning their actions.

The majority maintains that, because the causes of action of defamation and fraud are similar, we should not allow a separate action against an attorney for fraud when we do not allow one for defamation. The point remains, however, that there is one significant difference in the two causes of action. "[A]t common law, fraud must be proven by clear and convincing evidence." *Stuart v. Stuart, 297 Conn. 26, 40, 996 A.2d 259 (2010)*. Whereas, defamation claims, like most torts, must be proven by a fair preponderance of the evidence. See, e.g., *Gaudio v. Griffin Health Services Corp., 249 Conn. 523, 534-35, 733 A.2d 197 (1999)*. This difference is significant because the burden of proof is significantly higher in a fraud case.

I share the majority's concern regarding the potential chilling effect of frivolous actions against attorneys. For this reason, I have proposed a standard which, in my view, surpasses the safeguards that we have approved in allowing a vexatious litigation claim against attorneys. As indicated previously, [**106] I would require a finding of fraud or dishonesty to be made by the trial court on a motion for sanctions or a similar finding of misconduct to be made by the statewide grievance committee pursuant to *rule 8.4 (3) of the Rules of Professional Conduct* before allowing a party to maintain a separate cause of action against an attorney. I believe that the paucity of such events would provide an adequate safeguard against frivolous actions and protect against the "mere possibility of such claims, which [*581] could expose attorneys to harassing and expensive litigation . . . ."

The majority also points to the fact that "safeguards other than civil liability exist to deter or preclude attorney misconduct or to provide relief from that misconduct." The majority appropriately points to such options as: (1) a motion to open the judgment; (2) a grievance against the offending attorney; (3) judicial sanctions; (4) reprimand; (5) restitution; (6) assessment of costs; (7) return of a file to a client; (8) continuing legal education; (9) periodic audits; (10) medical treatment; (11) suspension; (12) disbarment; (13) attorney's fees; and (14) disciplinary sanctions for perjury or contempt. I agree with the [**107] majority on all of these points. My concern, however, is that there may be cases of this nature in which the injured party is not fully compensated for losses occasioned by the dishonesty of opposing counsel. It may be true that a court may order the attorney to pay, as sanctions, costs and attorney's fees. It is doubtful, however, that the court would order compensation in the form of lost income that may be alleged in a separate civil action. To the contrary, I would allow a cause of action wherein the complaining party was not fully compensated through the issuance of sanctions by the court. As an example, I use a variation on the facts of *Slotkin v. Citizens Casualty Co. of New York, supra, 614 F.2d 304*. In *Slotkin*, the attorney had wrongfully disclosed an inaccurate insurance policy limit. Id. What if the case had been tried for ten weeks and then settled based on the inaccurate policy information? In my view, a court acting on a motion for sanctions in such a case, under the majority's approach, would be unlikely to award damages to the deceived party for any time lost from work. In the event a party does not receive full compensation for such injuries, I believe that she or [**108] he should have a right to bring a separate action against the offending attorney.

[*582] I reiterate that my disagreement with the majority is not great. I would allow a separate action only in a very narrow class of cases that may arise during the course of any given year. There is not, as the majority states, a "'constant dread of retaliation'" for the honest attorney. Further, in my view, the entire bar would not suffer adverse consequences as a result of the narrow

exception to absolute privilege that I propose.

Moreover, in addition to the safeguard of conditioning a fraud claim on a specific finding of fraud made by the trial court on a motion for sanctions or made by the statewide grievance committee after a disciplinary hearing, the elements of the tort of fraud provide attorneys with yet another layer of protection from frivolous actions. Thus, although a specific finding of fraud by the lower court in the underlying action would suffice to allow a plaintiff to survive a motion to strike, a plaintiff would still be required to prove the traditional elements of fraud to prevail on his or her claim. As I have explained previously herein, these elements must be proven by clear and convincing [**109] evidence, which is a higher threshold than the preponderance of the evidence standard used for torts such as defamation and intentional interference with contractual relations. In order to recover in such an action, a plaintiff would have to prove that: "(1) a false representation was made as a statement of fact; (2) it was untrue and known to be untrue by the party making it; (3) it was made to induce the other party to act upon it; and (4) the other party did so act upon that false representation to his injury." *Suffield Development Associates Ltd. Partnership v. National Loan Investors, L.P., 260 Conn. 766, 777, 802 A.2d 44 (2002)*. The second element requires proof that the defendant knowingly and intentionally made a false representation. Thus, similar to a vexatious litigation claim, an attorney cannot be liable for fraud by making a statement in good faith, even if that statement [*583] is ultimately proven false. As such, the elements of fraud, like the elements of vexatious litigation and malicious prosecution, act as "built-in restraints that minimize the risk of inappropriate litigation." (Internal quotation marks omitted.) *Rioux v. Barry, supra, 283 Conn. 348*, quoting *Mozzochi v. Beck, supra, 204 Conn. 495*.

Therefore, [**110] there would be two distinct safeguards in place to protect attorneys from frivolous claims and minimize the risk of retaliatory litigation: (1) a threshold requirement that such causes of action be supported by a specific finding from the lower court or statewide grievance committee that the attorney has engaged in fraud or dishonesty in the underlying action to survive a motion to strike; and (2) the element of the tort of fraud that requires an attorney to act with the knowledge that his or her representation was untrue in order to be held liable. An attorney who engages in conduct that prompts the trial court in the underlying proceeding to make a specific finding of fraud, and who is then-in a separate action-found by a jury to have committed fraud, should not be entitled to absolute immunity. In my view, the policy underlying absolute immunity counsels strongly against protecting an attorney in this situation.

For the reasons stated previously, I respectfully concur in the majority's decision to affirm the judgment of the Appellate Court affirming the trial court's judgment for the defendants. I do agree, however, with the Connecticut Chapter of the American Academy of Matrimonial [**111] Lawyers, which filed an amicus brief in this matter and stated therein: "To allow attorneys immunity from claims for fraud based on their actions in court, where attorneys should be at the height of their ethical vigilance, would . . . send the wrong message to the public who relies on the ethical underpinnings of the legal system. Such a ruling would have a particularly pernicious [*584] effect on proceedings in a family court, where each party is so dependent on proper disclosure by the other." See *Billington v. Billington, supra, 220 Conn. 218*.

In my view, requiring a finding of fraud or dishonesty from the trial court or the statewide grievance committee would provide an adequate safeguard against frivolous actions and protect the attorney's duty to fully represent his or her client.

Accordingly, I respectfully concur.

DISSENT BY: PALMER

DISSENT

PALMER, J., dissenting. The issue in this case is whether attorneys should be granted absolute immunity from claims of civil fraud stemming from their conduct during judicial proceedings. Although I agree that the importance of vigorous representation of and fidelity to one's clients warrants protecting an attorney from the threat of baseless retaliatory claims, I disagree [**112] with the majority that absolute immunity is necessary to achieve that end with respect to claims of fraud. In my view, such claims should be permitted if the plaintiff first seeks relief in the underlying proceeding or files a grievance complaint against the offending attorney and, in connection therewith, secures either a sanction against the attorney or a finding of attorney misconduct. This limited immunity is sufficient to protect attorneys against

the threat of frivolous, retaliatory litigation, on the one hand, and provides a fair opportunity for recovery by a party who has been defrauded by opposing counsel, on the other.

The majority's decision to extend the litigation privilege to attorney fraud is out of step with the large majority of jurisdictions that, upon consideration of the issue, have expressly declined, either judicially or by statute, to broaden common-law immunity to include fraud. Moreover, the majority ignores the strong presumption [*585] against absolute immunity and dismisses the preferred option of limited immunity without analysis or justification. Finally, because no legitimate purpose is served by granting attorneys absolute litigation immunity rather than limited [**113] immunity, the majority's decision rightly will be viewed-by nonlawyers especially-as unduly protectionist of attorneys. Applying the limited immunity that I propose, I would conclude that the plaintiff, Robert Simms, should be permitted to pursue his claim that, during the proceedings on his motion for modification of alimony, the defendants Penny Q. Seaman, Susan A. Moch, Kenneth J. Bartschi, Brendon P. Levesque and Karen L. Dowd fraudulently did not disclose the fact that the plaintiff's former spouse, Donna Simms,[1] was the beneficiary of an impending inheritance from her uncle, Albert Whittington Hogeland.[2] For the foregoing reasons, I respectfully dissent.

1 Donna Simms also is a defendant in the present case. I refer to Seaman, Moch, Bartschi, Levesque and Dowd collectively as the defendants in this opinion.

2 I wish to emphasize that, at this stage of the case, the plaintiff's allegations against the defendants are just that-allegations. Because the trial court granted the defendants' motion to strike on the ground that they are absolutely immune from liability, the plaintiff has adduced no evidence relative to the allegations contained in his complaint. I conclude only that the [**114] plaintiff should not be foreclosed from attempting to do so under the circumstances of this case.

This court has long held that absolute immunity bars defamation and related claims arising out of statements made in the course of judicial or quasi-judicial proceedings.[3] See, e.g., *Rioux v. Barry, 283 Conn. 338, 344-46, 927 A.2d 304 (2007)*. This common-law immunity is rooted in the belief that, "in certain situations the public interest in having people speak freely outweighs the risk that individuals will occasionally abuse the privilege by [*586] making false and malicious statements. . . . Put simply, absolute immunity furthers the public policy of encouraging participation and candor in judicial and quasi-judicial proceedings. This objective would be thwarted if those persons whom the common-law doctrine was intended to protect nevertheless faced the threat of suit." (Citation omitted; internal quotation marks omitted.) *Chadha v. Charlotte Hungerford Hospital, 272 Conn. 776, 786-87, 865 A.2d 1163 (2005)*. "As a result, courts have recognized absolute immunity as a defense in certain retaliatory civil actions in order to remove this disincentive . . . ." *Rioux v. Barry, supra, 344*. This principle [**115] applies equally to attorneys as to parties, "[b]ecause litigants cannot have [unfettered] access [to our courts] without being assured of the unrestricted and undivided loyalty of their own attorneys"; *Mozzochi v. Beck, 204 Conn. 490, 494, 529 A.2d 171 (1987)*; something that would be difficult, if not impossible, to achieve if attorneys were required to represent their clients under the constant threat of unwarranted, retaliatory actions.

3 The majority devotes considerable time tracing the history of the litigation privilege insofar as it bars claims for defamation. No one disputes, however, that the privilege long has foreclosed defamation claims in this state and elsewhere.

As this court repeatedly has recognized, however, absolute immunity is such "strong medicine . . . [that] not every category of persons protected by immunity [is] entitled to absolute immunity. In fact, *just the opposite presumption prevails*--categories of persons protected by immunity are entitled only to the scope of immunity that is necessary to protect those persons in the performance of their duties." (Emphasis added; internal quotation marks omitted.) *Gross v. Rell, 304 Conn. 234, 247, 40 A.3d 240 (2012)*; accord [**116] *Carrubba v. Moskowitz, 274 Conn. 533, 540-41, 877 A.2d 773 (2005)*. We employ this presumption against absolute immunity--the same presumption that the United States Supreme Court employs in determining whether absolute or limited immunity is appropriate in any given case; see, e.g., *Burns v. Reed, 500 U.S. 478, 486-87, 111* [*587] *S. Ct. 1934, 114 L. Ed. 2d 547 (1991)*-because absolute immunity provides a shield against meritorious claims no less than baseless ones. Consequently, this court has not

barred all actions based on statements or conduct occurring during the course of litigation. Rather, "whether and what form of immunity applies in any given case is a matter of policy that requires a balancing of interests." *Rioux v. Barry, supra, 283 Conn. 346*.

Upon applying this balancing test, this court has concluded that absolute immunity does not apply to actions for abuse of process; *Mozzochi v. Beck, supra, 204 Conn. 495*; vexatious litigation; *Rioux v. Barry, supra, 283 Conn. 348-49*; or malicious prosecution. See *McHale v. W.B.S. Corp., 187 Conn. 444, 450, 446 A.2d 815 (1982)*. In the case of each such tort, we concluded that the tort itself "has built-in restraints that minimize the risk of [**117] inappropriate [retaliatory] litigation." (Internal quotation marks omitted.) *Rioux v. Barry, supra, 348*; accord *Mozzochi v. Beck, supra, 495*. Specifically, the three torts require, as a prerequisite to suit, that the previous action had been terminated in the plaintiff's favor, and all three torts have stringent additional requirements that provide further protection against inappropriate retaliatory claims.[4] See *Rioux v. Barry*, [*588] *supra, 347* (tort of vexatious litigation requires proof that defendant pursued unfounded civil claim against plaintiff with malice primarily for purpose other than to bring offender to justice, and without probable cause); *Falls Church Group, Ltd. v. Tyler, Cooper & Alcorn, LLP, 281 Conn. 84, 95 n.10, 912 A.2d 1019 (2007)* (tort of abuse of process requires proof that defendant used legal process for wrongful and malicious purpose to attain unjustifiable end or object that process was not meant to effect); *McHale v. W.B.S. Corp., supra, 447* (tort of malicious prosecution, which arises out of prior, unfounded criminal complaint, essentially requires same proof as tort of vexatious litigation).

> 4 I am not persuaded by the majority's attempt to distinguish fraudulent [**118] conduct from conduct constituting abuse of process and vexatious litigation on the ground that the former, in contrast to the latter, "does not subvert the underlying *purpose* of a judicial proceeding"; (emphasis in original); and that, "[c]onsequently, this court's reasons for precluding use of the litigation privilege in cases alleging abuse of process and vexatious litigation have no application to claims of fraud." First, a fraudulent motion or application filed in a judicial proceeding may well subvert the underlying purpose of that aspect of the proceeding to which the fraud was directed. Insofar as a distinction may be drawn in any given case between a claim of fraud, on the one hand, and a claim of abuse of process or vexatious litigation, on the other, it is a distinction without a meaningful difference. Attorney fraud, whenever it occurs, is no less serious or corruptive of the judicial process than an action brought without probable cause and for an improper purpose. Moreover, to the extent that it may be argued that fraud claims against attorneys should be treated differently from abuse of process and vexatious litigation claims for purposes of absolute immunity, the rationale [**119] for doing so is found in the built-in protections that are a feature of the torts of abuse of process and vexatious litigation, and has little or nothing to do with the distinction on which the majority relies. Contrary to the assertion of the majority, I am not "confuse[d]" by that distinction. Footnote 14 of the majority opinion. Rather, I see no import in it.

Conversely, this court has held that attorneys are absolutely immune from defamation claims arising out of their conduct in judicial proceedings because of the absence of any mechanism, inherent in the tort of defamation or otherwise, for distinguishing wholly groundless claims from potentially meritorious ones. See, e.g., *Petyan v. Ellis, 200 Conn. 243, 246, 510 A.2d 1337 (1986)*. Although this means that even meritorious defamation claims are foreclosed, the fundamental policy concern underlying absolute immunity[5]"outweigh[s] the interest of the private [litigant] in being free from defamation." *Rioux v. Barry, supra, 283 Conn. 345*.

> 5 As Judge Charles Edward Clark explained nearly seventy years ago, the "[f]earless administration of justice requires, among other things, that an attorney have the privilege of representing his [**120] client's interests, without the constant menace of claims for libel." *Bleecker v. Drury, 149 F.2d 770, 771 (2d Cir. 1945)*.

As a general matter, fraud by an attorney is far more serious than defamation by an attorney.[6] Indeed, the [*589] former, in contrast to the latter, necessarily provides the basis for sanctions in the underlying proceeding, or for a grievance complaint, or both.[7] The prospect of these two disciplinary remedies undoubtedly serves as a significant deterrent to the unethical attorney

who [*590] otherwise might opt to engage in fraudulent conduct. Neither remedy, however, is likely to be an adequate substitute for a civil action by a litigant who can establish damages arising out of an attorney's fraudulent misconduct. The primary issue presented by this case, then, is whether it is necessary or desirable to shield attorneys completely from claims of fraud, thereby foreclosing the possibility of any civil remedy against an attorney who commits fraud--no matter how egregious or harmful that fraud may be--by affording attorneys absolute immunity from such claims.[8]

6 I disagree with the majority that attorney fraud "is similar in essential respects to defamatory statements," an assertion [**121] that the majority makes to support its conclusion that fraud should be treated identically to defamation for immunity purposes. First, I believe that this view understates the gravity of the harm associated with attorney fraud, an intentional tort that necessarily involves dishonest conduct that is antithetical to our legal system and the vital role of attorneys in that system. In fact, fraudulent misconduct frequently violates the criminal law. In contrast, a defamation action carries no scienter requirement, let alone a requirement of a dishonest or deceitful purpose. Furthermore, in part because a claim of fraud is so serious, it must be proven by clear and convincing evidence, whereas defamation claims are subject to the traditional preponderance of the evidence standard of proof. Moreover, as I discuss more fully in this opinion, many jurisdictions have declined to extend the litigation privilege to attorney fraud, whereas attorney defamation remains protected by the privilege. The reason for this differential treatment is obvious: fraud is significantly more serious than virtually any other tort, including defamation.

I therefore cannot agree with the majority's assertion that [**122] "attempt[ing] to assess and compare the relative degree of harm caused by different types of misconduct is not very useful in determining whether the privilege should apply in the present case" because "virtually all claims of [tortious conduct] during judicial proceedings, including defamation, allege some kind of 'serious or corruptive' effect on the judicial process . . . ." Footnote 14 of the majority opinion. On the contrary, the seriousness of the tortious conduct is most relevant to the immunity question, and I believe it to be self-evident that fraud, and attorney fraud in particular, is especially, if not uniquely, corruptive of the judicial process. Insofar as the majority rejects the distinction between fraud and defamation in terms of the severity and harm of the conduct involved in each, that fact alone is sufficient to cast serious doubt on the validity of the majority's decision to adopt absolute immunity for attorney fraud.

Furthermore, as I explain more fully hereinafter, there is a mechanism for screening baseless fraud claims and no such mechanism for screening baseless defamation claims. In this important respect, fraud claims are far more similar to claims of abuse [**123] of process, vexatious litigation and malicious prosecution than they are to defamation claims. As I also discuss hereinafter, the majority dismisses this point with no meaningful analysis.

7 Defamation by an attorney during the course of a judicial proceeding conceivably could provide the basis for disciplinary action against that attorney, either in the form of sanctions in that proceeding or in connection with a grievance complaint, if the attorney's defamatory statements were sufficiently outrageous and harmful. Attorney fraud, by contrast, always will provide such a basis for such actions.

8 I wish to note my disagreement with the majority's reliance on federal cases holding that judges, prosecutors and witnesses are entitled to absolute immunity under *42 U.S.C. § 1983*. In particular, the majority reasons that "[f]ederal decisions [granting absolute] immunity [to] government attorneys and prosecutors acting as officers of the court in . . . actions [under *42 U.S.C. § 1983*]" support the conclusion that private attorneys are entitled to the same level of immunity "because, as the United States Supreme Court explained in *Briscoe v. LaHue, 460 U.S. 325, [334-35], 103 S. Ct. 1108, 75 L. Ed. 2d 96 (983)* [**124] the litigation privilege at common law protected *all* participants in the court system, and private attorneys were treated no differently than judges, government lawyers and witnesses." (Emphasis in original.) The absolute immunity to which the court in *Briscoe* was referring,

however, is the immunity accorded to *defamatory statements* under the litigation privilege. See *Burns v. Reed, supra, 500 U.S. 489-90* ("[l]ike witnesses, prosecutors and other lawyers were absolutely immune from damages liability at common law for making false or defamatory statements in judicial proceedings . . . and also for eliciting false and defamatory testimony from witnesses"); *Briscoe v. LaHue, supra, 331, 335* (absolute common-law privilege pertained to defamatory statements); *Imbler v. Pachtman, 424 U.S. 409, 437-40, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976)* (White, J., concurring in judgment) (historically, absolute privilege applied to defamation and malicious prosecution claims against participants in judicial proceedings); see also *Imbler v. Pachtman, supra, 441* (White, J., concurring in judgment) ("[t]here was no absolute immunity at common law for prosecutors other than absolute immunity from suits for [**125] malicious prosecution and defamation"). For purposes of determining the extent to which the participants in the judicial process are entitled to absolute immunity from claims under *42 U.S.C. § 1983, including broad protection from claims other than defamation*, such as malicious prosecution, the United States Supreme Court has employed a functional analysis; see, e.g., *Burns v. Reed, supra, 486* (court employs functional approach to immunity); *Cornejo v. Bell, 592 F.3d 121, 127 (2d Cir.)* (functional analysis used to determine whether and to what extent immunity should be accorded public official or participant in judicial process), cert. denied sub nom. *Cornejo v. Monn, U.S. , 131 S. Ct. 158, 178 L. Ed. 2d 243 (2010)*; "after considering the history of the common law immunity." *Robinson v. Volkswagenwerk AG, 940 F.2d 1369, 1370 (10th Cir. 1991)*, cert. denied sub nom. *Herzfeld & Rubin v. Robinson, 502 U.S. 1091, 112 S. Ct. 1160, 117 L. Ed. 2d 408 (1992)*. Thus, as the Supreme Court has explained in recognizing such broad immunity for claims arising out of the conduct of prosecutors "in initiating a prosecution and in presenting the [s]tate's case"; *Imbler v. Pachtman, supra, 431*; [**126] they, like judges, play a unique role in our justice system; see *id., 429*; and for reasons directly related to that role, nothing short of complete immunity is adequate to ensure that they are able to discharge their public duty free from concerns of unfounded lawsuits by criminal defendants displeased with their discretionary decisions. *Id., 422-24*; see also *id., 422-23* ("The common-law immunity of a prosecutor is based [on] the same considerations that underlie the common-law immunities of judges and grand jurors acting within the scope of their duties. These include the concern that harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust.").

In granting prosecutors this expansive immunity, "the [c]ourt in *Imbler* declined to accord prosecutors only qualified immunity because, among other things, suits against prosecutors for initiating and conducting prosecutions could be expected with some frequency, for a defendant often will transform his resentment at being prosecuted into the ascription of [**127] improper and malicious actions to the [s]tate's advocate . . . lawsuits would divert prosecutors' attention and energy away from their important duty of enforcing the criminal law . . . prosecutors would have more difficulty than other officials in meeting the standards for qualified immunity . . . and potential liability would prevent the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system . . . ." (Citations omitted; internal quotation marks omitted.) *Burns v. Reed, supra, 500 U.S. 485-86*, quoting *Imbler v. Pachtman, supra, 424 U.S. 425, 427-28*. Contrary to the majority's assertion, the functional approach that the United States Supreme Court uses in affording prosecutors, as well as judges, grand jurors and witnesses, complete immunity--immunity that includes protection against claims of malicious prosecution--does *not* support the conclusion that attorneys are entitled to that broad immunity. In fact, it militates *against* that conclusion because the United States Supreme Court never has extended to private counsel the same expansive immunity that it has accorded prosecutors, whose special role in our [**128] justice system is readily distinguishable from that of private

attorneys. See *Burns v. Reed, supra, 487* ("[w]e have been quite sparing in our recognition of absolute immunity . . . and have refused to extend it any further than its justification would warrant" [citation omitted; internal quotation marks omitted]). Indeed, in *Tower v. Glover, 467 U.S. 914, 923, 104 S. Ct. 2820, 81 L. Ed. 2d 758 (1984)*, the court expressly concluded that the same immunity does not apply to the intentional misconduct of public defenders. In reaching this conclusion, the court explained that, even though public defenders may have certain responsibilities that are similar to those of a judge or prosecutor, at common law, privately retained defense counsel "would have benefited from immunity for defamatory statements made in the course of judicial proceedings" but *not* for intentional misconduct. *Id., 922*. Thus, as one federal appeals court has explained after carefully reviewing United States Supreme Court precedent on absolute immunity, "while absolute immunity might be afforded [to] government lawyers on these claims [of fraud during a judicial proceeding], such immunity is not available for a private [**129] law firm." *Robinson v. Volkswagenwerk AG, supra, 940 F.2d 1371*. "While we recognize that prosecutors and government lawyers defending civil actions have been granted absolute immunity on similar claims, the cases do not support an analogous common law tradition for private lawyers." *Id., 1372-73*. "[The] [p]laintiffs . . . seek to hold [the defendant law firm] liable based [on] allegedly fraudulent statements in the course of discovery and at trial, but we cannot identify a common law precedent for absolute immunity on such claims. The claims asserted are not for defamation and [the law firm] cannot avail itself of the immunity afforded [to] government lawyers responsible for vindicating the public interest. We must conclude that [the law firm] is not entitled to absolute immunity for the [allegedly fraudulent] discovery and litigation statements contained in the plaintiffs' . . . complaint." *Id., 1373-74*. It is because of the clear and significant differences in the role of a public prosecutor and the role of a private attorney that the former is accorded complete immunity and the latter only limited immunity--differences that the United States Supreme Court and this court expressly [**130] have recognized in affording immunity to prosecutors from malicious prosecution claims; see, e.g., *Imbler v. Pachtman, supra, 422-24*; *Massameno v. Statewide Grievance Committee, 234 Conn. 539, 567, 663 A.2d 317 (1995)*; *DeLaurentis v. New Haven, 220 Conn. 225, 242, 597 A.2d 807 (1991)*; but permitting such claims against other attorneys. If, as the majority asserts, "[t]he rationale for granting absolute immunity to . . . prosecutors is the same as that employed in justifying the litigation privilege for private attorneys in defamation actions," either prosecutors would not be shielded from malicious prosecution claims or private attorneys would be accorded protection from such claims.

[*591] [*592] If, as in cases of alleged attorney defamation, there was no viable way to protect attorneys against the threat of baseless fraud claims, it might well be that absolute immunity for claims of fraud would be warranted.[9] Because, however, a litigant who can establish that he or she was victimized by attorney fraud invariably will be entitled to sanctions or other disciplinary action against the offending attorney, there is an alternative [*593] to absolute immunity for such fraud claims. This alternative is to permit [**131] such claims if the plaintiff first has obtained a sanction or finding of impropriety against the attorney, either in connection with the underlying proceeding itself or in connection with a grievance complaint. Under this approach, the plaintiff has a challenging but not insurmountable task, one that is essentially equivalent to the burden placed on a plaintiff seeking to establish the tort of vexatious litigation, malicious prosecution or abuse of process. Those torts, which are permitted because they have been deemed to have sufficient built--in protections against abuse, require proof that the underlying action or proceeding was terminated in the plaintiff's favor and that the action or proceeding had been instituted without legal cause for an improper purpose. Under the limited immunity that I propose for claims of fraud, the plaintiff must convince a judge or grievance panel that the attorney's conduct was improper--certainly, no less of a showing than that the litigation terminated in favor of the plaintiff, which is required before a claim may be brought for vexatious litigation, malicious prosecution or abuse of process-and then must prove in the civil action, by clear and convincing [**132] evidence, that the attorney made an intentionally false statement for the purpose of deceiving

the plaintiff--arguably, an even more demanding showing than that required under any of the three other torts. I believe, therefore, that the limited immunity afforded attorneys under this approach strikes an eminently fair balance between the interest of defrauded litigants in being compensated for the harm associated with attorney fraud, on the one hand, and the public interest in ensuring that attorneys are free from the threat of unwarranted retaliatory litigation, on the other.[10]

9 For the reasons set forth generally by Judge Bishop in his concurrence and dissent in *Simms v. Seaman, 129 Conn. App. 651, 674-81, 23 A.3d 1 (2011)* (*Bishop, J.*, concurring and dissenting), I believe that the issue of whether absolute immunity is preferable to no immunity for fraud claims against attorneys presents a close question. In light of my conclusion that limited immunity for such claims is preferable to either of those two alternatives, I need not address that question.

10 In his concurring opinion, Justice Eveleigh proposes an approach pursuant to which a plaintiff would be permitted to pursue a fraud [**133] action against the opposing attorney only if the plaintiff first has secured a finding of fraud by the trial court in the underlying proceeding or by the statewide grievance committee in connection with a grievance complaint. In my view, this places the bar too high, largely because the plaintiff may not have an adequate opportunity in either forum, through discovery or otherwise, to fully flesh out the alleged fraud. Moreover, the standard that Justice Eveleigh proposes provides even greater protection to attorneys than that afforded by the torts of vexatious litigation, malicious prosecution and abuse of process. Under Justice Eveleigh's approach, the plaintiff has the heavy burden of securing an actual finding of fraud by the trial court or the statewide grievance committee; then, to prevail in the civil action, the plaintiff again must meet the extremely demanding requirements of the tort of fraud. See, e.g., *Sturm v. Harb Development, LLC, 298 Conn. 124, 142, 2 A.3d 859 (2010)* ("[t]he essential elements of an action in common law fraud . . . are that: [1] a false representation was made as a statement of fact; [2] it was untrue and known to be untrue by the party making it; [3] [**134] it was made to induce the other party to act [on] it; and [4] the other party did so act [on] that false representation to his injury"). These requirements are more stringent than the requirements of the torts of vexatious litigation, malicious prosecution and abuse of process, which may be brought merely upon proof that the plaintiff prevailed in the previous action, and which will be established upon proof of bad faith and a lack of probable cause. In contrast, the standard that I propose provides equivalent protection to the protection afforded by those other torts. In view of the strong public policy against granting broader immunity than that which is necessary to achieve its purpose; see, e.g., *Gross v. Rell, supra, 304 Conn. 247*; I respectfully disagree with the standard that Justice Eveleigh advocates.

[*594] It bears emphasis that blanket immunity for attorneys who commit fraud during the course of judicial proceedings raises serious policy concerns not implicated by other tortious conduct, including defamation. Such fraud not only victimizes the affected litigant, it also strikes at the heart of the judicial process. In recognition of the seriousness of attorney fraud, at least one [**135] dozen states have enacted statutes expressly renouncing any privilege for conduct during the course of a judicial proceeding when, as is alleged in the present case, an attorney engages in fraudulent misconduct in the course of that proceeding. See *Ark. Code Ann. § 16-22-310* (1999); *Cal. Civ. Code § 47* (Deering 2005); *Ind. Code Ann. § 33-43-1-8* (LexisNexis 2012); *Iowa Code Ann. § 602.10113* (West 1996); *Minn. Stat. Ann. § 481.07* (West 2002); *Mont. Code Ann. § 37-61-406* (2011); *N.Y. Jud. Law § 487* (McKinney 2005); *N.C. Gen. Stat. Ann. § 84-13* (West 2011); *N.D. Cent. Code § 27-13-08* (2006); *Okla. Stat. Ann. tit. 21, § 575* [*595] (West 2002); *couS.D. Codified Laws § 16-19-34* (2004); *Wyo. Stat. Ann. § 33-5-114* (2011).

In addition to these statutory provisions, courts in other jurisdictions expressly have rejected the view that attorneys should be granted absolute immunity for fraud committed in a judicial proceeding. See, e.g., *Robinson v. Volkswagenwerk AG, 940 F.2d 1369, 1373-74 (10th Cir. 1991)* ("[The] [p]laintiffs . . . seek to hold [the defendant law firm] liable based [on] allegedly fraudulent statements in the course of discovery and at trial, but we cannot identify a common law precedent for [**136] absolute immunity on such claims. The claims asserted are not for defamation and [the defendant] cannot avail

itself of the immunity afforded government lawyers responsible for vindicating the public interest. . . . [The defendant] is not entitled to absolute immunity for the discovery and litigation statements contained in the plaintiffs' . . . complaint."), cert. denied sub nom. *Herzfeld & Rubin v. Robinson, 502 U.S. 1091, 112 S. Ct. 1160, 117 L. Ed. 2d 408 (1992)*; *Kramer v. Midamco, Inc., United States District Court, Docket No. 1:07 CV 3164, 2009 U.S. Dist. LEXIS 96898 (N.D. Ohio October 19, 2009*) ("[The defendant attorneys] argue that they are immune from the fraud claim because a litigation privilege protects individuals from civil liability for any false or malicious statements made in judicial proceedings. . . . [H]owever, that privilege has been specifically assigned to protect against civil claims for defamation . . . extended to include libel and intentional infliction of emotional distress claims . . . . The Ohio Supreme Court has stated that the privilege is limited, and does not create an exemption from all claims; and, it has not extended this privilege to . . . fraud claims. . . . It is not a barrier [**137] to the claims . . . alleged in this action." [Citations omitted.]); *Thompson v. Paul, 657 F. Sup. 2d 1113, 1122 (D. Ariz. 2009)* (under Arizona law, "fraud claims premised on alleged defamation by opposing [*596] counsel are barred [by the litigation privilege]; fraud claims arising outside of the defamation context are not necessarily barred"); *McGee v. Hyatt Legal Services, Inc., 813 P.2d 754, 757 (Colo. App. 1990)* ("[a]n attorney, while performing his obligations to his client, is liable to third parties [for conduct undertaken during a judicial proceeding] only when his conduct is fraudulent or malicious"), cert. denied, Colorado Supreme Court, *Docket No. 90SC753, 1991 Colo. LEXIS 519 (Colo. July 29, 1991)*; *Matsuura v. E. I. du Pont de Nemours & Co., 102 Haw. 149, 160, 162, 73 P.3d 687 (2003)* ("[c]riminal contempt, attorney discipline, and criminal prosecution deter the type of litigation misconduct alleged in [this] case" but "none of these remedies compensate[s] the victims of such misconduct," and, therefore, "[u]nder Hawaii law, a party is not immune from liability for civil damages based [on] that party's fraud engaged in during prior litigation proceedings"); *Taylor v. McNichols, 149 Idaho 826, 840, 243 P.3d 642 (2010)* [**138] ("Application of the litigation privilege varies across jurisdictions, but the common thread found throughout is the idea that an attorney acting within the law, in a legitimate effort to zealously advance the interests of his client, shall be protected from civil claims arising [out of] that zealous representation. An attorney engaging in malicious prosecution, which is necessarily pursued in bad faith, is not acting in a manner reasonably calculated to advance his client's interests, and an attorney engaging in fraud is likewise acting in a manner foreign to his duties as an attorney."); *Querner v. Rindfuss, 966 S.W.2d 661, 666 (Tex. App. 1998, pet. denied)* ("If an attorney acting for his client participates in fraudulent activities, his action is foreign to the duties of an attorney. . . . An attorney, therefore, is liable if he knowingly commits a fraudulent act or knowingly enters into a conspiracy to defraud a third person. . . . Even in the litigation context, a lawyer cannot shield himself from liability [*597] on the ground that he was an agent because no one is justified on that ground in knowingly committing a [wilful] and premeditated fraud for another." [Citations omitted; internal [**139] quotation marks omitted.]); *Clark v. Druckman, 218 W. Va. 427, 435, 624 S.E.2d 864 (2005)* ("[T]he litigation privilege generally operates to preclude actions for civil damages arising from an attorney's conduct in the litigation process. However, the litigation privilege does not apply to claims of malicious prosecution and fraud."). Indeed, significantly more courts have *declined* to afford absolute immunity to attorneys against claims of fraud than have afforded attorneys such protection.[11] In fact, the majority cites but one such case, *Bennett v. Jones, Waldo, Holbrook & McDonough, 2003 UT 9, 70 P.3d 17, 34 (Utah 2003)*, in which the court held that a claim of deceit, which is materially similar to a claim of fraud, is barred by the litigation privilege.[12] Thus, when the various state statutes that [*598] [*599] except attorney fraud from coverage under the litigation privilege are considered, it is apparent that the vast majority of states that have addressed the issue have declined to extend the privilege to such fraud.[13]

11 The majority's assertion that my reliance on "most" of these cases "is misplaced"; footnote 28 of the majority opinion; is indeed surprising in view of the plain language quoted in each [**140] such case.

I note that the reasoning of the Hawaii Supreme Court in rejecting a claim that the litigation privilege barred an action for fraud committed during a judicial proceeding is instructive as to why so many states have reached the same conclusion, either judicially or statutorily. See *Matsuura v. E. I. du Pont de Nemours & Co., supra, 102 Haw. 162*. That court

reviewed the various relevant considerations, and, although it acknowledged that the history of the case before it "demonstrate[d] how collateral proceedings burden court resources and protract litigation"; id.; it nevertheless determined that, "given (1) the courts' objective of uncovering truth, (2) the injurious effect of fraud on the ability to test the evidence presented, (3) the preference for judgments on the merits, (4) [the] court's duty to discourage abusive litigation practices, and (5) the desire to encourage settlement . . . the interests in (a) avoiding the chilling effect of collateral litigation, (b) reinforcing the finality of judgments, and (c) limiting collateral attacks on judgments are outweighed when fraud is alleged." Id. Accordingly, the court held that "a party is not immune from liability for civil [**141] damages based [on] that party's fraud engaged in during prior litigation proceedings." Id.

12 The majority identifies several cases from other jurisdictions that, it contends, support its decision to extend the litigation privilege to claims of attorney fraud. A review of those cases, however, reveals that only *Bennett* stands for the proposition that attorney fraud should be protected by the litigation privilege. Although the other cases on which the majority relies extend the litigation privilege to claims other than defamation, they simply do not address the question raised by this appeal, namely, whether fraud claims are barred by absolute immunity. See, e.g., *Dory v. Ryan, 25 F.3d 81, 83 (2d Cir. 1994)* (absolute immunity for conspiracy to commit perjury applies to prosecutor but not to witness); *Abanto v. Hayt, Hayt & Landau, P.L., United States District Court, Docket No. 11-24543-CIV, 2012 U.S. Dist. LEXIS 133788 (S.D. Fla. September 19, 2012*) (in case involving no allegation of fraud, court determined that litigation privilege applied to claim under Florida Consumer Collection Practices Act); *Hahn v. United States Dept. of Commerce, United States District Court, Docket No. 11-6369 (ES), 2012 U.S. Dist. LEXIS 128327 (D.N.J. September 10, 2012* [**142]) (in case involving no claim of fraud, court determined that litigation privilege barred claims under *42 U.S.C. § 1983* asserted against defendant lawyers and law firms); *Rickenbach v. Wells Fargo Bank, N.A., 635 F. Sup. 2d 389, 402 and n.10 (D.N.J. 2009)* (concluding that litigation privilege applied to claims of negligence and breach of duty of good faith and fair dealing but declining to determine whether privilege applied to claim under Fair Debt Collections Practices Act); *Linder v. Brown & Herrick, 189 Ariz. 398, 406, 943 P.2d 758 (App. 1997)* (holding, as court in *Thompson v. Paul, supra, 657 F. Sup. 2d 1122* explained, that fraud claims based on defamation by opposing counsel are barred but fraud claims falling outside of defamation context are not necessarily barred); *Echevarria, McCalla, Raymer, Barrett & Frappier v. Cole, 950 So. 2d 380, 384 (Fla. 2007)* (in case involving no claim of fraud, court held that litigation privilege applied to statutory as well as common-law claims); *Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. United States Fire Ins. Co., 639 So. 2d 606, 608 (Fla. 1994)* (in case involving no claim of fraud, court held that claim of tortious [**143] interference with business relationship was barred by litigation privilege).

I also note my disagreement with the majority's reliance on a recent federal case, *Walsh v. Law Offices of Howard Lee Schiff, United States District Court, Docket No. 3:11-cv-1111 (SRU), 2012 U.S. Dist. LEXIS 136408 (D. Conn. September 24, 2012)*, in which the United States District Court for the District of Connecticut adopted an absolute privilege for purposes of a claim against an attorney under the Connecticut Unfair Trade Practices Act (CUTPA), *General Statutes § 42-110a et seq.*, that the attorney had made certain "false, deceptive, and/or misleading representations in the course of litigating the [a]ction" at issue. (Internal quotation marks omitted.) Id. A review of the decision in *Walsh* reveals that the vast majority of the District Court's analysis is devoted to an unrelated issue of federal law, which, according to the District Court, ultimately required dismissal of the plaintiff's CUTPA claim. The District Court then turned briefly to the state law immunity issue, and, in one short paragraph consisting entirely of citations to several state court cases involving defamation actions, concluded summarily, and as an alternative ground [**144] for granting the defendant's motion to dismiss, that the plaintiff's

CUTPA claim also was barred by the litigation privilege. In light of the extremely limited nature of the District Court's analysis, I do not think that the majority's reliance on *Walsh* is warranted, especially because the CUTPA action that was the subject of the District Court's ruling was not a true fraud claim, and there is nothing in the decision to suggest that the District Court had considered whether limited immunity, rather than absolute immunity, is appropriate for claims of attorney fraud. To the extent that the majority would treat the CUTPA claim in *Walsh* as a fraud claim because the complaint in that case alleges, inter alia, "false, deceptive, and/or misleading representations"; (internal quotation marks omitted) id.; including "fabricated documents" and a "false affidavit"; (internal quotation marks omitted) id.; the majority's view reflects a fundamental misconception both of the elements of the tort of fraud and the import of a factual allegation in a pleading as distinguished from a cause of action. First, there is nothing in the complaint in *Walsh* alleging that the false, misleading or deceptive [**145] statements were *knowingly* false, misleading or deceptive, as is required for purposes of a claim of fraud. Furthermore, even if such knowing falsity had been alleged, the plaintiff in *Walsh* would not have been required to prove it in order to establish a CUTPA violation because CUTPA has no such requirement; under CUTPA, proof of a false, misleading or deceptive statement or conduct would suffice. Finally, a fraud claim must be proven by clear and convincing evidence; see, e.g., *Kilduff v. Adams, Inc., 219 Conn. 314, 330, 593 A.2d 478 (1991)*; whereas the standard of proof for a CUTPA claim is a preponderance of the evidence. See, e.g., *Service Road Corp. v. Quinn, 241 Conn. 630, 644, 698 A.2d 258 (1997)*. Consequently, a CUTPA claim, and, in particular, the CUTPA claim at issue in *Walsh*, is in no respect similar or analogous to a fraud claim. The decision in *Walsh* therefore provides no support for the majority's holding.

13 The majority challenges this assertion, claiming that it is "misleading because it is based on a lack of information regarding state legislatures that may have considered and rejected abrogation of the privilege" and it "fails to indicate how many other jurisdictions [**146] . . have recognized the privilege judicially." (Citation omitted.) Footnote 28 of the majority opinion. The majority's assertion is flawed. As the majority itself acknowledges, at common law, the litigation privilege applied to defamation claims. Although Utah has extended the privilege to fraud; see *Bennett v. Jones, Waldo, Holbrook & McDonough, supra, 70 P.2d 34*; the substantial majority of states that have considered the issue have expressly declined to extend the privilege, either legislatively or judicially. With respect to those state legislatures that have taken no action on the issue, the majority is correct, of course, that one or more of them might do so in the future, one way or the other. In contrast to the majority, however, I see no reason to give any weight to such a completely speculative possibility. With respect to judicial extensions of the privilege to claims of fraud, if the majority were aware of a case or cases other than *Bennett*, presumably, it would identify them. Thus, more than twenty jurisdictions have rejected the litigation privilege for claims of fraud; the majority identifies one jurisdiction that grants absolute immunity for such claims.

[*600] Notably, in [**147] its amicus brief, the Connecticut Chapter of the American Academy of Matrimonial Lawyers[14](Connecticut Chapter), a highly respected organization comprised of many of the finest matrimonial lawyers in this state, takes a similar position, stating: "The Connecticut Chapter is committed to the rule of law and to the uniform administration of justice. The interest of the [amicus] in this case is the protection of the integrity of practice by attorneys in the family courts of Connecticut. To allow attorneys immunity from claims for fraud based on their actions in court, where attorneys should be at the height of their ethical vigilance, would send the wrong message to lawyers. Moreover, it would send the wrong message to the public who relies on the ethical underpinnings of the legal system. Such a ruling would have a particularly pernicious effect on proceedings in family court, where each party is so dependent on proper disclosure by the other." The considerations that the amicus identifies are important ones. See, e.g., *Simms v. Seaman, 129 Conn. App. 651, 674-78, 23 A.3d 1 (2011)* (*Bishop, J.*, concurring and dissenting) (discussing policy considerations that militate against grant of [**148] absolute immunity to attorneys for their allegedly fraudulent misconduct during judicial

proceedings). The Connecticut Chapter further suggests that, if this court is not convinced that [*601] the elements of the tort of fraud are alone sufficient to shield attorneys from the threat of groundless fraud claims, we should consider steps short of affording attorneys complete immunity. For the foregoing reasons, I believe that the limited immunity that I propose represents the proper balance between the various competing considerations.

> 14 The amicus brief filed by the Connecticut Chapter of the American Academy of Matrimonial Lawyers (Connecticut Chapter) describes the American Academy of Matrimonial Lawyers (American Academy) as follows: "The American Academy . . . is a national organization of approximately 1600 attorneys recognized as experts in the field of family law. The [American Academy] was founded in 1962 to encourage the study, improve the practice, elevate the standards and advance the cause of matrimonial law, with the goal of protecting the welfare of the family and society. The Connecticut Chapter of the [American Academy] . . . is comprised of thirty-four . . . fellows. The fellows [**149] of the Connecticut Chapter represent litigants in family matters at the trial and appellate levels involving prenuptial and postnuptial agreements, adoption, dissolution of marriage, custody of children, disposition of property, and the apportionment of financial support."

The majority nevertheless summarily rejects limited or qualified immunity as an inadequate substitute for absolute immunity, reasoning that "attorneys would still be subject to a possibly significant increase in litigation because dissatisfied parties seeking to benefit financially may be more inclined to seek penalties from the court or the statewide grievance committee so that they may proceed with the civil action." Footnote 30 of the majority opinion. I disagree with the majority for several reasons. First, there is no reason to believe that, under the approach I propose, attorneys would be subject to *any* increase in the filing of motions for sanctions and grievance complaints, let alone a significant increase, and I submit that the majority's highly speculative assertion to the contrary is unsupported. Indeed, the majority itself acknowledges the speculative nature of its assertion in characterizing any potential [**150] increase in the number of such motions and complaints as only "possibly" significant. Id. Moreover, it seems apparent that most litigants who believe (1) that their legal interests have been compromised by the fraud or dishonesty of an adversary's counsel, *and* (2) that they can establish such fraud or dishonesty, are likely either to seek monetary sanctions, file a grievance, or both, irrespective of whether, if successful, they also would be permitted to pursue a civil action for fraud against the attorney.

More important, however, in raising the spectre of a possible increase in the number of such motions and complaints, the majority fails to address the crux of the issue: does this possibility, however remote, make [*602] it more likely that attorneys will be deterred from representing the interests of their clients robustly? A litigation privilege is warranted to protect against that eventuality. But even in a system that affords attorneys absolute immunity, they are subject to sanctions and grievances, and I do not see how the truly speculative possibility that a litigant conceivably might be more inclined to file a meritless motion for sanctions or a grievance complaint will adversely [**151] affect the manner in which an attorney represents his or her client. After all, we do not presume that attorneys are deterred from aggressively representing their clients for fear that they might be the subject of a baseless motion for sanctions or an unfounded grievance complaint. Indeed, an attorney simply has no control over such frivolous filings, which, on relatively rare occasions, are an unfortunate fact of life for nearly anyone who practices law.

Finally, in dismissing out of hand the option of limited immunity, the majority essentially ignores the competing interests, namely, the private interest of the plaintiff in receiving compensation for the harm attributable to the attorney's fraud, on the one hand, and the public interest in holding dishonest attorneys civilly accountable for their fraudulent misconduct, on the other. In failing to balance the relevant interests, the majority reaches a conclusion that is unfairly weighted in favor of attorneys alleged to have engaged in fraud and against litigants who may have been victimized by that fraudulent conduct. Absolute immunity is unnecessary, and therefore unwarranted, because limited immunity of the kind that I propose would [**152] provide attorneys with sufficient protection from the threat of baseless retaliatory actions and, at the same time, afford litigants a reasonable opportunity to obtain recourse against an

attorney who has engaged in fraudulent misconduct during the course of a judicial proceeding.[15]

15 The majority states that I have "fail[ed] to recognize, or even address, compelling considerations [that are] contrary" to the approach that I have proposed and which the majority "find[s] persuasive." Footnote 29 of the majority opinion. Unfortunately, the majority does not identify any one or more of the considerations that it accuses me of failing to address, and I am not aware of any.

[*603] Applying these principles to the present case is not altogether straightforward, in part because the history of the underlying matrimonial case is long and tortured, and in part because the parties have not litigated this case with those principles in mind. In any event, the record reveals that, in April, 2005, the plaintiff in the present case filed an amended motion for modification of alimony. In October, 2005, the trial court, *Tierney, J.*, granted the motion upon finding a substantial change of circumstances. On appeal, [**153] this court concluded that, although the trial court properly had found a change of circumstances, the court abused its discretion with respect to the amount of the reduction, and, therefore, a new hearing was required. *Simms v. Simms, 283 Conn. 494, 504, 509-10, 927 A.2d 894 (2007)*. At that hearing, the plaintiff alleged, inter alia, that his former spouse, Donna Simms, fraudulently had not disclosed, in connection with the 2005 hearing, that, as a named beneficiary of the will of her deceased uncle, she was about to receive a substantial, albeit as yet undetermined, inheritance. Following an evidentiary hearing on the plaintiff's motion, the trial court, *Munro, J.*, found that counsel for Donna Simms knew of her impending inheritance at the time of the 2005 hearing but did not disclose that fact. The court further stated that the trial court, *Tierney, J.*, and this court should have been informed of the inheritance but were not and, further, that the failure of counsel to do so was wrongful.[16] In light of the court's express finding of a [*604] knowing impropriety by virtue of counsel's failure to disclose the inheritance, I believe that the plaintiff should be permitted to pursue his claim [**154] of fraud against the defendants in the present case.[17]

16 To be sure, the trial court, *Munro, J.*, also observed that "the court is not confronted with a question of fraud here," and, further, that the evidence indicated that counsel for Donna Simms *at the time* of the 2005 hearing, and *not* counsel for Donna Simms in the proceedings before Judge Munro, knew of the inheritance. Judge Munro had no occasion to elaborate on these statements, and, consequently, it is impossible to determine precisely how they might bear on the issue presented in this case. In any event, I acknowledge that, in light of these additional statements, it reasonably can be argued that the plaintiff's claims against one or more of the defendants should be barred even under the qualified immunity model that I have proposed. Because the plaintiff could not possibly have anticipated that model, however, I believe that, for purposes of the present case only, the fairer course would be to apply the proposed methodology liberally to permit the plaintiff's claims to go forward against all of the defendants.

17 I also would permit the plaintiff to pursue his claim for intentional infliction of emotional distress because that [**155] claim arises out of precisely the same facts on which the plaintiff's fraud claim is predicated. Consequently, regardless of whether the plaintiff's intentional infliction of emotional distress claim otherwise would be foreclosed by the litigation privilege, there is no reason to bar that claim unless the fraud claim also is barred by that privilege.

Accordingly, I respectfully dissent.