BISHOP, J., concurring and dissenting. Attorneys take an oath to "do nothing dishonest . . . not knowingly allow anything dishonest to be done in court, and . . . inform the court of any dishonesty of which [they] have knowledge . . . ." General Statutes § 1-25. Because I cannot agree with the majority that lawyers should be absolutely immune, as a matter of law, from claims sounding in fraud, I respectfully dissent from that part of the majority opinion which affirms the judgment in favor of the defendants Penny Q. Seaman, Susan A. Moch, Kenneth J. Bartschi, Brendon P. Levesque and Karen L. Dowd on the fraud claims alleged by the plaintiff, Robert Simms. In all other respects, I concur with the majority opinion.

Whether or not to extend immunity to attorneys for their conduct in the course of legal representation is a question of public policy. *Rioux* v. *Barry*, 283 Conn. 338, 343, 927 A.2d 304 (2007). Because, to date, there is no Connecticut appellate decisional law addressing the issue of whether attorneys are immune from suit in actions based upon fraud, the question we must answer in this appeal is whether sound public policy supports the notion that lawyers should be immune from the consequences of their fraudulent behavior. My answer to that question is, "No."

In answering this question in the affirmative, the majority appears to rely on the Supreme Court's analysis in *Rioux* v. *Barry*, supra, 283 Conn. 338, and, by implication, the majority appears to liken fraudulent behavior to the intentional interference with contractual relations. Unlike the majority, I do not believe the behaviors in these two intentional torts are sufficiently parallel to extend the insulation provided in *Rioux* to fraudulent behavior. In *Rioux*, the court held that, in the context of a quasi-judicial proceeding, although absolute immunity does not attach to statements that provide the basis for a vexatious litigation claim, it does bar a suit alleging that those same statements constitute an intentional interference with contractual or beneficial relations. Id., 350–51. The court noted that because the requisite elements of vexatious litigation effectively strike the balance between the public interest of encouraging complaining witnesses to come forward and protecting private individuals from false and malicious claims, the additional protections afforded by the doctrine of absolute immunity do not extend in the context of such a claim. Id., 348–49. In other words, "an attorney may be sued in an action for vexatious litigation . . . because that cause of action has built-in restraints that minimize the risk of inappropriate litigation." (Internal quotation marks omitted.) Id., 348, quoting *Mozzochi* v. *Beck*, 204 Conn. 490, 495, 529 A.2d 171 (1987). The

court concluded, however, that because the tort of intentional interference with contractual or beneficial relations does not contain the restraints that are provided in vexatious litigation, absolute immunity barred the plaintiff's claim of intentional interference with contractual or beneficial relations against the defendants with respect to those statements. *Rioux* v. *Barry*, supra, 283 Conn 350–51.

I, too, find the reasoning in *Rioux* and *Mozzochi* instructive. Like a claim for vexatious litigation, a claim for fraud includes a more stringent requirement that eliminates the need to extend the protection of absolute immunity to prevent inappropriate litigation. While claims for defamation and intentional interference must be proven by a fair preponderance of the evidence, a claim for fraud requires a higher standard of proof, a higher threshold which provides more protection for attorneys than the lower burden of proof applicable to most tort claims, including the intentional interference with contractual or beneficial relations. "[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).[1] In light of the higher burden of proof imposed upon a plaintiff alleging fraud, a claim for fraud is readily distinguishable from claims for defamation or intentional interference, and, consequently, like a claim for vexatious litigation, provides a balance between the public and private interests involved.

Additionally, the policy considerations set forth in *Rioux* are not applicable to the case at hand. In *Rioux*, the court explained that its ruling was based upon the underlying public policy that is furthered by the extension of absolute immunity, to "encourag[e] participation and candor in judicial and quasi-judicial proceedings," noting that such policy would "be thwarted if those persons whom the common-law doctrine was intended to protect nevertheless faced the threat of suit." (Internal quotation marks omitted.) *Rioux* v. *Barry*, supra, 283 Conn. 344.[2] It would, indeed, be ironic to posit that extending absolute immunity from fraud to attorneys in their role as litigators would further the policy goal of encouraging honesty in judicial proceedings. Indeed, logic dictates the opposite conclusion.

Immunizing lawyers from claims based on fraudulent behavior serves no legitimate public policy. Reciprocally, leaving counsel subject to claims for fraud does not create the risk of unduly dampening an attorney's advocacy on behalf of a client.[3] Thus, the conclusion I reach is not inconsistent with the policy expressed in *Mozzochi*. In *Mozzochi*, the court considered "the scope of the potential liability of an attorney for abuse of process arising out of the attorney's professional representation of the interests of his or her clients" and noted that "[s]uch a cause of action must be reconciled with

our responsibility to assure unfettered access to our courts. Because litigants cannot have such access 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." *Mozzochi* v. *Beck*, supra, 204 Conn. 494–95.

Although I agree that an attorney's relationship with his or her clients is paramount, the duty of advocacy exists in a broader context. As noted in the Rules of Professional Conduct, an attorney has a duty to his client, the court, and to the community. See generally Rules of Professional Conduct, preamble. In examining the balance between the public interest in a client's right to counsel's zealous advocacy of his or her cause and a litigant's right to have claims regarding an attorney fairly aired, I do not believe that an attorney's "robust representation of the interests of his or her client"; *Mozzochi* v. *Beck*, supra, 204 Conn. 497; can fairly be construed to insulate an attorney from claims made by third parties based on counsel's allegedly fraudulent conduct.

The view I express is in accord with the Restatement (Third) of the Law Governing Lawyers and Thornton on Attorneys at Law, which posit, generally, that a lawyer may be held liable for fraud. See 1 Restatement (Third), The Law Governing Lawyers §§ 51 and 56 (2000);[4] 1 E. Thornton, Attorneys at Law (1914) § 295. Although, as noted, Connecticut has no appellate decisional law directly on point, several other jurisdictions have adhered to the rule espoused by those authorities.[5] For instance, the Michigan Court of Appeals, citing to Thornton, has held: "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." (Internal quotation marks omitted.) *Schunk* v. *Zeff & Zeff, P.C.*, 109 Mich. App. 163, 180, 311 N.W.2d 322 (1981) (MacKenzie, J., dissenting), leave to appeal denied, 413 Mich. 924 (1982), relying on *Rosenberg* v. *Cyrowski*, 227 Mich. 508, 513, 198 N.W. 905 (1924). Similarly, the Supreme Court of New York has stated that attorneys are "liable to nonclients for acts of fraud, collusion, malicious acts or other special circumstances . . . ." (Citations omitted; internal quotation marks omitted.) *New York Cooling Towers, Inc.* v. *Goidel*, 10 Misc. 3d 219, 222, 805 N.Y.S.2d 779 (2005). And the Colorado Supreme Court has noted that "an attorney is not liable to a non-client absent a finding of fraud or malicious conduct by the attorney." *Mehaffy, Rider, Windholz & Wilson* v. *Central Bank Denver, N.A.*, 892 P.2d 230, 235 (Colo. 1995) (en banc); see also *McGee* v. *Hyatt Legal Services, Inc.*, 813 P.2d 754, 757 (Colo. App. 1990) (citing *Weigel* v. *Hardesty*, 37 Colo. App. 541, 543, 549 P.2d 1335 (1976) [when performing obliga-

tions to client, attorney liable to third parties only when conduct fraudulent or malicious]), cert. denied, 1991 Colo. LEXIS 519 (Colo. July 29, 1991). Citing to 1 Restatement (Third), supra, § 56, which states that "a lawyer is subject to liability to a client or nonclient when a nonlawyer would be in similar circumstances," the United States District Court for the Middle District of Tennessee has held that a lawyer is not shielded from liability for fraudulent conduct. *Pagliara* v. *Johnston Barton Proctor & Rose, LLP*, United States District Court, Docket No. 3:10-cv-00679 (M.D. Tenn. October 6, 2010). The Ohio Supreme Court has stated that the privilege is limited, and, it has not extended this immunity to fraud claims. See *Kramer* v. *Midamco, Inc.*, United States District Court, Docket No. 1:07 CV 3164 (N.D. Ohio October 19, 2009), citing *Bigelow* v. *Brumley*, 138 Ohio St. 574, 580, 37 N.E.2d 584 (1941); *Erie County Farmers' Ins. Co.* v. *Crecelius*, 122 Ohio St. 210, 215, 171 N.E. 97 (1930). Finally, in this regard, the Idaho Supreme Court has stated: "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." *Taylor* v. *McNichols*, 243 P.3d 642, 656 (Idaho 2010).[6]

To be sure, not all courts have followed this path. Some jurisdictions have extended the immunity to fraudulent conduct by attorneys in the context of judicial or quasi-judicial proceedings. For example, see *Olsen* v. *Harbison*, 191 Cal. App. 4th 325, 333, 119 Cal. Rptr. 3d 460 (2010) ("The breadth of the litigation privilege cannot be understated. It immunizes defendants from virtually any tort liability [including claims for fraud], with the sole exception of causes of action for malicious prosecution."), review denied, 2011 Cal. LEXIS 2266 (Cal. March 2, 2011); see also *Fraidin* v. *Weitzman*, 93 Md. App. 168, 237, 611 A.2d 1046 (1992) (to remove privilege, attorney must possess desire to harm, which is independent of desire to protect client), cert. denied, 329 Md. 109, 617 A.2d 1055 (1993); *Alpert* v. *Crain, Caton & James, P.C.*, 178 S.W.3d 398, 408 (Tex. App. 2005) (litigation privilege bars fraud claim based on actions such as filing lawsuits and pleadings, providing legal advice, and awareness of settlement negotiations), review denied, 2006 Tex. LEXIS 155 (Tex. March 3, 2006).

Mindful of the various approaches taken by other jurisdictions, I am persuaded by those that adhere to the Restatement (Third) of the Law Governing Lawyers, as I find no policy worthy of the public that would extend the protection of immunity to counsel for the consequences of his or her fraudulent conduct.

As an alternate ground for affirming the judgment of the trial court, the defendants assert that the plaintiff

has failed to set forth a cognizable cause of action for fraud, an argument that they raised in their motions to strike. Although a cursory review of the plaintiff's complaint reveals that, indeed, some of the necessary elements of a cause of action in fraud do not appear to be alleged, the trial court did not address that argument in granting the defendants' motions to strike. Rather, the court struck the fraud claims solely on the basis of absolute immunity. If the court had granted the motions to strike on the ground that the plaintiff had failed to set forth an action for fraud, rather than on the basis of immunity, the plaintiff would have been afforded the opportunity to replead, assuming that a good faith basis exists for formulating a proper complaint containing the elements necessary for stating a claim based on fraud. See Practice Book § 10-44. Thus, because the motions to strike were granted solely on the basis of immunity, I would reverse the judgment as to the fraud claims and remand the matter to the trial court for consideration of the remaining arguments set forth in the defendants' motions to strike.

[1] "Proof by clear and convincing evidence is an intermediate standard generally used in civil cases involving allegations of fraud or some other quasi-criminal wrongdoing, or when particularly important individual rights are involved. . . . The preponderance of the evidence standard indicates that the litigants should share equally the risk of error . . . because the interests at stake have roughly equal societal importance." (Citation omitted; internal quotation marks omitted.) *State* v. *Davis*, 229 Conn. 285, 293–94, 641 A.2d 370 (1994).

[2] The majority also appears to endorse the notion that there are policy reasons to immunize attorneys from the consequences of fraudulent behavior in conjunction with litigation that may not protect attorneys from suit in the event their fraudulent conduct relates to nonlitigation representation. Unlike the majority, I can fathom no basis for such a distinction as, in both circumstances, lawyers committing fraud do not serve their clients by doing so.

[3] The notion that opening the door to fraud claims against attorneys will cause a floodgate of litigation is without factual underpinnings. To the contrary, I am unaware that our courts are inundated with claims of attorney malpractice or claims of vexatious litigation, both torts for which there is no policy-driven immunization.

[4] 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 . . . (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 . . . ."

Section 56 provides in relevant part: "[A] lawyer is subject to liability to a client or nonclient when a nonlawyer would be in similar circumstances."

[5] Although cases cited herein from other jurisdictions do not involve adjudication of fraud claims, the reviewing court, in each of the cited opinions, noted with approval that liability for fraudulent conduct is an exception to the immunity afforded to lawyers.

[6] Additionally, as acknowledged by the majority, some states have enacted legislation expressly permitting civil actions for fraud against attorneys.