ROBERT SIMMS *v.* PENNY Q. SEAMAN ET AL.
(SC 18839)

Rogers, C. J., and Norcott, Palmer, Zarella, Eveleigh and Vertefeuille, Js.

Argued September 19, 2012—officially released May 21, 2013

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.

Opinion

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 affirming the judgment of the trial court rendered in favor of the defendants Penny Q. Seaman, Susan A. Moch, Kenneth J. Bartschi, Brendon 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.

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 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 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.

"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 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].

"On October 17, 2008, the trial court ruled that . . . information concerning the inheritance . . . improperly 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.

"[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, 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).

The plaintiff appealed to the Appellate Court, claiming that the trial court improperly had determined that 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 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 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 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 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 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 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, would not lie against a peer accused of forgery whose case was still pending because "no punishment was ever 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 previ-

ous 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 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 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 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 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 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 (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 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 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 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.

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 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 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 absolute immunity with respect to statement in affidavit by witness), the court 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 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 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 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 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 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 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 abuse the privilege by making 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 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 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 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 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 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 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 to prove want of probable cause, malice and a termination of suit in the plaintiff's favor.").

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 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 statements: if made in the course of a judicial or quasi-judicial proceeding, they are absolutely immune." (Citations omitted.) Id., 350–51.

Similarly, this court has 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 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* 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. 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 that defamatory statements are protected. 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 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 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]

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 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 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 representation to his injury. . . . [T]he party to whom the false representation was made [must claim] to have relied on that repre-

sentation 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 to both 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 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 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 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 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 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]

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) (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 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 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 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 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 "min-

ister[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).

D

Federal Precedent

Fourth, in civil rights actions filed under 42 U.S.C. § 1983,[20] federal courts, including the United States Supreme Court and the United States Court of Appeals for the Second Circuit, have recognized 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); 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 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]

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 and n.34, 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 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); *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 (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, Docket No. 03-20977 (5th Cir. June 10, 2004).[23]

The rationale for granting absolute immunity to federal prosecutors is the same as that employed in justifying the litigation privilege for private attorneys in 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 inevitably makes many decisions that could engender colorable claims of constitutional deprivation. Defending 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 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." (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 States District Court, Docket No. 3:11-cv-1111 (SRU) (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 . . . . 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 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]

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 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 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 the part of 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.

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 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 (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 proceeding").[28]

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 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 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 (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) (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) ("the litigation privilege applies in all causes of action, whether for common-law torts or statutory violations," including alleged violations of Florida 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*, 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]

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 foreclosure 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 the Appellate Court properly determined that attorneys are protected by the litigation privilege against claims of fraud for their conduct during judicial proceedings.[30]

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 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 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]

The judgment of the Appellate Court is affirmed.

In this opinion ROGERS, C. J., and NORCOTT and

VERTEFEUILLE, Js., concurred.

[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 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.

[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.

[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 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."

[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.

[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.

[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 the pleadings, in affidavits, or in open court").

[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 proceeding terminated in the plaintiff's favor." *Rioux* v. *Barry*, supra, 283 Conn. 347.

[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).

[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 a judicial proceed-

ing 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.

[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 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 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 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.

[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 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."

[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 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 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); 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 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.

[23] Insofar as the plaintiff cites cases from other jurisdictions in support of his contention that attorneys are not 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, 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 (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 (M.D. Tenn. October 6, 2010). 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, 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, 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 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 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 concurrence relies thus fail to support its assertion that an attorney may be sued for fraudulent conduct that occurs during judicial proceedings.

[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).

[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 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 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. 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.

[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 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 (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 (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 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) (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 to have addressed the issue, no valid conclusions can be reached regarding any judicial trend.

[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 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.

[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 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 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.

[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.