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

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

The question of whether to extend absolute immunity to attorneys for statements and representations made during judicial proceedings requires us to examine the

public policy considerations behind absolute immunity. See *Rioux* v. *Barry*, 283 Conn. 338, 343, 927 A.2d 304 (2007). The underlying public policy that is furthered by absolute immunity is to "encourag[e] participation and candor in judicial and quasi-judicial proceedings." (Internal quotation marks omitted.) Id., 344. Thus, affording a party absolute immunity promotes honesty and candor by protecting that party from retaliatory actions for statements made during judicial proceedings. See *Petyan* v. *Ellis*, 200 Conn. 243, 252–53, 510 A.2d 1337 (1986) (libel and intentional infliction of emotional distress claims against defendant for statements made to state labor department barred by absolute immunity). Absolute immunity, however, has not been conferred in every circumstance in which it has been sought. See, e.g., *Rioux* v. *Barry*, supra, 343 (absolute immunity does not bar vexatious litigation claim); *Mozzochi* v. *Beck*, 204 Conn. 490, 494–95, 529 A.2d 171 (1987) (absolute immunity does not bar claim of abuse of process against attorney if plaintiff alleges attorney engaged in specific misconduct intended to cause specific injury outside of normal contemplation of private litigation); *McHale* v. *W.B.S. Corp.*, 187 Conn. 444, 447–48, 446 A.2d 815 (1982) (absolute immunity does not bar malicious prosecution claim). Rather, courts extend absolute immunity to a defendant only in those situations where "the public interest in having people speak freely outweighs the risk that individuals will occasionally abuse the privilege by making false and malicious statements." (Internal quotation marks omitted.) *Rioux* v. *Barry*, supra, 343. Indeed, "absolute immunity is of a 'rare and exceptional character.' " *Barrett* v. *United States*, 798 F.2d 565, 571 (2d Cir. 1986), quoting *Cleavinger* v. *Saxner*, 474 U.S. 193, 202, 106 S. Ct. 496, 88 L. Ed. 2d 507 (1985).

In those situations where there are sufficient safeguards in place to protect the defendant from false and malicious claims, courts have declined to extend absolute immunity. For example, this court has refused to extend absolute immunity to protect a defendant from a vexatious litigation claim. In *Rioux* v. *Barry*, supra, 283 Conn. 340–42, the plaintiff brought claims for vexatious litigation and intentional interference with contractual relations against the defendants for allegedly making false statements in an attempt to get the plaintiff fired. In declining to attach absolute immunity to the statements that provided the basis for the tort of vexatious litigation, this court stated that the elements of the tort of vexatious litigation provide sufficient protection to defendants who make complaints or statements in good faith. Id., 346–47. Specifically, we noted that "[v]exatious litigation requires a plaintiff to establish that: (1) the previous lawsuit or action was initiated or procured by the defendant against the plaintiff; (2) the defendant acted with malice, primarily for a purpose other than that of bringing an offender

to justice; (3) the defendant acted without probable cause; and (4) the proceeding terminated in the plaintiff's favor." Id., 347. If the defendants acted in good faith, therefore, a vexatious litigation claim could not succeed against them. Thus, because the "stringent requirements" of vexatious litigation provided adequate protection to defendants from retaliatory actions, this court found it "unnecessary to apply an additional layer of protection to would-be litigants in the form of absolute immunity." Id., 347–48. Conversely, this court did extend absolute immunity to bar the plaintiff's claims for intentional interference with contractual relations. Id., 350. The court concluded that, because the elements of intentional interference with contractual relations did not provide the defendants with the same level of protection as the elements of vexatious litigation, absolute immunity was necessary to protect against "the chilling of a witness' testimony." Id., 351.

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

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

the defendants were attorneys did not prevent them from being liable for their fraudulent conduct. Likewise, in *Robinson* v. *Volkswagenwerk AG*, 940 F.2d 1369, 1373–74 (10th Cir. 1991), cert. denied, 502 U.S. 109, 112 S. Ct. 1160, 117 L. Ed. 2d 408 (1992), the United States Court of Appeals for the Tenth Circuit held that private attorneys are not entitled to absolute immunity for fraudulent statements made during the course of discovery and litigation. In reaching this conclusion, the court in *Robinson* stated that, although attorneys are entitled to absolute immunity from defamation claims, they are not entitled to immunity for malicious prosecution. Id., 1372. The court then concluded that a fraud claim should be treated similarly to a malicious prosecution claim and, thus, absolute immunity was not granted to the defendants. Id., 1372–73; see id. (after stating that absolute immunity does not apply to malicious prosecution claims, court stated that "[w]e think a similar rule applies in this case"); see also *New York Cooling Towers, Inc.* v. *Goidel*, 10 Misc. 3d 219, 222, 805 N.Y.S.2d 779 (2005) (attorneys are "liable to nonclients for acts of fraud, collusion, malicious acts or other special circumstances" [internal quotation marks omitted]); *Mehaffy, Rider, Windholz & Wilson* v. *Central Bank, N.A.*, 892 P.2d 230, 235 (Colo. 1995) ("[g]enerally, an attorney is not liable to a [nonclient] absent a finding of fraud or malicious conduct by the attorney"). In addition, Edward Thornton's treatise entitled Attorneys at Law and the Restatement (Third) of the Law Governing Lawyers state that attorneys may generally be held liable for fraud.[1]

Additionally, Connecticut courts have long emphasized the need for full and frank disclosure in matrimonial dissolution actions. This court has held that "lawyers who represent clients in matrimonial dissolutions have a special responsibility for full and fair disclosure, for a searching dialogue, about all of the facts that materially affect the client's rights and interests." *Monroe* v. *Monroe*, 177 Conn. 173, 183, 413 A.2d 819, cert. denied, 444 U.S. 801, 100 S. Ct. 20, 62 L. Ed. 2d 14 (1979). The requirement of honest disclosure also applies to the information that the litigating parties convey to the court. See *Billington* v. *Billington*, 220 Conn. 212, 220, 595 A.2d 1377 (1991); *Baker* v. *Baker*, 187 Conn. 315, 322, 445 A.2d 912 (1982). In fact, this court has concluded that the disclosure required between marital parties is the same as that required between a fiduciary and a beneficiary. *Billington* v. *Billington*, supra, 221 ("We have recognized, furthermore, in the context of an action based upon fraud, that the special relationship between fiduciary and beneficiary compels full disclosure by the fiduciary. . . . Although marital parties are not necessarily in the relationship of fiduciary to beneficiary, we believe that no less disclosure is required of such parties when they come to court seeking to terminate their marriage."

[Citation omitted.]). Therefore, requiring full and frank disclosure during litigation and allowing an aggrieved party to seek redress for injuries caused by fraudulent misrepresentations are not novel legal concepts in this state.

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

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

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

a fraudulent statement presented to the court as the foundation for an action and a fraudulent statement proffered directly to the court by an attorney during the course of litigation are equally reprehensible.

The facts of *Barrett* v. *United States*, supra, 798 F.2d 565, a case relied on by the majority, are distinguishable from those in the present case. *Barrett* involved a cause of action against government attorneys. The court in *Barrett* noted that "[a]bsolute immunity from liability has been accorded to a few types of government officials whose duties are deemed as a matter of public policy to require such protection to enable them to function independently and effectively, without fear or harassment." Id., 571. Moreover, *Barrett* did not overrule *Slotkin*, another case from the Second Circuit, which expressly permits a cause of action against private attorneys. *Slotkin* v. *Citizens Casualty Co. of New York*, supra, 614 F.2d 318. Similarly, I also disagree with the majority's reliance on 42 U.S.C. § 1983 and the absolute immunity enjoyed by some government officials and attorneys. We are not dealing with the actions of government officials in this case. Therefore, the same rationale does not apply.

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

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

I share the majority's concern regarding the potential chilling effect of frivolous actions against attorneys. For this reason, I have proposed a standard which, in my view, surpasses the safeguards that we have

approved in allowing a vexatious litigation claim against attorneys. As indicated previously, I would require a finding of fraud or dishonesty to be made by the trial court on a motion for sanctions or a similar finding of misconduct to be made by the statewide grievance committee pursuant to rule 8.4 (3) of the Rules of Professional Conduct before allowing a party to maintain a separate cause of action against an attorney. I believe that the paucity of such events would provide an adequate safeguard against frivolous actions and protect against the "mere possibility of such claims, which could expose attorneys to harassing and expensive litigation . . . ."

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

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

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

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

For the reasons stated previously, I respectfully con-

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

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

Accordingly, I respectfully concur.

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

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

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

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

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

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

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

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

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

instituted.