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

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

This court has long held that absolute immunity bars defamation and related claims arising out of statements made in the course of judicial or quasi-judicial proceedings.[3] See, e.g., *Rioux* v. *Barry*, 283 Conn. 338, 344–46, 927 A.2d 304 (2007). This common-law immunity is rooted in the belief that, "in certain situations the public interest in having people speak freely outweighs the risk that individuals will occasionally abuse the privilege by making false and malicious statements. . . . Put simply, absolute immunity furthers the public policy of

encouraging participation and candor in judicial and quasi-judicial proceedings. This objective would be thwarted if those persons whom the common-law doctrine was intended to protect nevertheless faced the threat of suit." (Citation omitted; internal quotation marks omitted.) *Chadha* v. *Charlotte Hungerford Hospital*, 272 Conn. 776, 786–87, 865 A.2d 1163 (2005). "As a result, courts have recognized absolute immunity as a defense in certain retaliatory civil actions in order to remove this disincentive . . . ." *Rioux* v. *Barry*, supra, 344. This principle applies equally to attorneys as to parties, "[b]ecause litigants cannot have [unfettered] access [to our courts] without being assured of the unrestricted and undivided loyalty of their own attorneys"; *Mozzochi* v. *Beck*, 204 Conn. 490, 494, 529 A.2d 171 (1987); something that would be difficult, if not impossible, to achieve if attorneys were required to represent their clients under the constant threat of unwarranted, retaliatory actions.

As this court repeatedly has recognized, however, absolute immunity is such "strong medicine . . . [that] not every category of persons protected by immunity [is] entitled to absolute immunity. In fact, *just the opposite presumption prevails*—categories of persons protected by immunity are entitled only to the scope of immunity that is necessary to protect those persons in the performance of their duties." (Emphasis added; internal quotation marks omitted.) *Gross* v. *Rell*, 304 Conn. 234, 247, 40 A.3d 240 (2012); accord *Carrubba* v. *Moskowitz*, 274 Conn. 533, 540–41, 877 A.2d 773 (2005). We employ this presumption against absolute immunity—the same presumption that the United States Supreme Court employs in determining whether absolute or limited immunity is appropriate in any given case; see, e.g., *Burns* v. *Reed*, 500 U.S. 478, 486–87, 111 S. Ct. 1934, 114 L. Ed. 2d 547 (1991)—because absolute immunity provides a shield against meritorious claims no less than baseless ones. Consequently, this court has not barred all actions based on statements or conduct occurring during the course of litigation. Rather, "whether and what form of immunity applies in any given case is a matter of policy that requires a balancing of interests." *Rioux* v. *Barry*, supra, 283 Conn. 346.

Upon applying this balancing test, this court has concluded that absolute immunity does not apply to actions for abuse of process; *Mozzochi* v. *Beck*, supra, 204 Conn. 495; vexatious litigation; *Rioux* v. *Barry*, supra, 283 Conn. 348–49; or malicious prosecution. See *McHale* v. *W.B.S. Corp.*, 187 Conn. 444, 450, 446 A.2d 815 (1982). In the case of each such tort, we concluded that the tort itself "has built-in restraints that minimize the risk of inappropriate [retaliatory] litigation." (Internal quotation marks omitted.) *Rioux* v. *Barry*, supra, 348; accord *Mozzochi* v. *Beck*, supra, 495. Specifically, the three torts require, as a prerequisite to suit, that the previous action had been terminated in the plaintiff's

favor, and all three torts have stringent additional requirements that provide further protection against inappropriate retaliatory claims.[4] See *Rioux* v. *Barry*, supra, 347 (tort of vexatious litigation requires proof that defendant pursued unfounded civil claim against plaintiff with malice primarily for purpose other than to bring offender to justice, and without probable cause); *Falls Church Group, Ltd.* v. *Tyler, Cooper & Alcorn, LLP*, 281 Conn. 84, 95 n.10, 912 A.2d 1019 (2007) (tort of abuse of process requires proof that defendant used legal process for wrongful and malicious purpose to attain unjustifiable end or object that process was not meant to effect); *McHale* v. *W.B.S. Corp.*, supra, 447 (tort of malicious prosecution, which arises out of prior, unfounded criminal complaint, essentially requires same proof as tort of vexatious litigation).

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

As a general matter, fraud by an attorney is far more serious than defamation by an attorney.[6] Indeed, the former, in contrast to the latter, necessarily provides the basis for sanctions in the underlying proceeding, or for a grievance complaint, or both.[7] The prospect of these two disciplinary remedies undoubtedly serves as a significant deterrent to the unethical attorney who otherwise might opt to engage in fraudulent conduct. Neither remedy, however, is likely to be an adequate substitute for a civil action by a litigant who can establish damages arising out of an attorney's fraudulent misconduct. The primary issue presented by this case, then, is whether it is necessary or desirable to shield attorneys completely from claims of fraud, thereby foreclosing the possibility of any civil remedy against an attorney who commits fraud—no matter how egregious or harmful that fraud may be—by affording attorneys absolute immunity from such claims.[8]

If, as in cases of alleged attorney defamation, there was no viable way to protect attorneys against the threat of baseless fraud claims, it might well be that absolute immunity for claims of fraud would be warranted.[9] Because, however, a litigant who can establish that he or she was victimized by attorney fraud invariably will be entitled to sanctions or other disciplinary action against the offending attorney, there is an alternative to absolute immunity for such fraud claims. This alter-

native is to permit such claims if the plaintiff first has obtained a sanction or finding of impropriety against the attorney, either in connection with the underlying proceeding itself or in connection with a grievance complaint. Under this approach, the plaintiff has a challenging but not insurmountable task, one that is essentially equivalent to the burden placed on a plaintiff seeking to establish the tort of vexatious litigation, malicious prosecution or abuse of process. Those torts, which are permitted because they have been deemed to have sufficient built-in protections against abuse, require proof that the underlying action or proceeding was terminated in the plaintiff's favor and that the action or proceeding had been instituted without legal cause for an improper purpose. Under the limited immunity that I propose for claims of fraud, the plaintiff must convince a judge or grievance panel that the attorney's conduct was improper—certainly, no less of a showing than that the litigation terminated in favor of the plaintiff, which is required before a claim may be brought for vexatious litigation, malicious prosecution or abuse of process—and then must prove in the civil action, by clear and convincing evidence, that the attorney made an intentionally false statement for the purpose of deceiving the plaintiff—arguably, an even more demanding showing than that required under any of the three other torts. I believe, therefore, that the limited immunity afforded attorneys under this approach strikes an eminently fair balance between the interest of defrauded litigants in being compensated for the harm associated with attorney fraud, on the one hand, and the public interest in ensuring that attorneys are free from the threat of unwarranted retaliatory litigation, on the other.[10]

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

In addition to these statutory provisions, courts in other jurisdictions expressly have rejected the view that attorneys should be granted absolute immunity

for fraud committed in a judicial proceeding. See, e.g., *Robinson* v. *Volkswagenwerk AG*, 940 F.2d 1369, 1373–74 (10th Cir. 1991) ("[The] [p]laintiffs . . . seek to hold [the defendant law firm] liable based [on] allegedly fraudulent statements in the course of discovery and at trial, but we cannot identify a common law precedent for absolute immunity on such claims. The claims asserted are not for defamation and [the defendant] cannot avail itself of the immunity afforded government lawyers responsible for vindicating the public interest. . . . [The defendant] is not entitled to absolute immunity for the discovery and litigation statements contained in the plaintiffs' . . . complaint."), cert. denied sub nom. *Herzfeld & Rubin* v. *Robinson*, 502 U.S. 1091, 112 S. Ct. 1160, 117 L. Ed. 2d 408 (1992); *Kramer* v. *Midamco, Inc.*, United States District Court, Docket No. 1:07 CV 3164 (N.D. Ohio October 19, 2009) ("[The defendant attorneys] argue that they are immune from the fraud claim because a litigation privilege protects individuals from civil liability for any false or malicious statements made in judicial proceedings. . . . [H]owever, that privilege has been specifically assigned to protect against civil claims for defamation . . . extended to include libel and intentional infliction of emotional distress claims . . . . The Ohio Supreme Court has stated that the privilege is limited, and does not create an exemption from all claims; and, it has not extended this privilege to . . . fraud claims. . . . It is not a barrier to the claims . . . alleged in this action." [Citations omitted.]); *Thompson* v. *Paul*, 657 F. Sup. 2d 1113, 1122 (D. Ariz. 2009) (under Arizona law, "fraud claims premised on alleged defamation by opposing counsel are barred [by the litigation privilege]; fraud claims arising outside of the defamation context are not necessarily barred"); *McGee* v. *Hyatt Legal Services, Inc.*, 813 P.2d 754, 757 (Colo. App. 1990) ("[a]n attorney, while performing his obligations to his client, is liable to third parties [for conduct undertaken during a judicial proceeding] only when his conduct is fraudulent or malicious"), cert. denied, Colorado Supreme Court, Docket No. 90SC753 (Colo. July 29, 1991); *Matsuura* v. *E. I. du Pont de Nemours & Co.*, 102 Haw. 149, 160, 162, 73 P.3d 687 (2003) ("[c]riminal contempt, attorney discipline, and criminal prosecution deter the type of litigation misconduct alleged in [this] case" but "none of these remedies compensate[s] the victims of such misconduct," and, therefore, "[u]nder Hawaii law, a party is not immune from liability for civil damages based [on] that party's fraud engaged in during prior litigation proceedings"); *Taylor* v. *McNichols*, 149 Idaho 826, 840, 243 P.3d 642 (2010) ("Application of the litigation privilege varies across jurisdictions, but the common thread found throughout is the idea that an attorney acting within the law, in a legitimate effort to zealously advance the interests of his client, shall be protected from civil claims arising [out of] that zealous representation. An attorney engaging in malicious pros-

ecution, which is necessarily pursued in bad faith, is not acting in a manner reasonably calculated to advance his client's interests, and an attorney engaging in fraud is likewise acting in a manner foreign to his duties as an attorney."); *Querner* v. *Rindfuss*, 966 S.W.2d 661, 666 (Tex. App. 1998, pet. denied) ("If an attorney acting for his client participates in fraudulent activities, his action is foreign to the duties of an attorney. . . . An attorney, therefore, is liable if he knowingly commits a fraudulent act or knowingly enters into a conspiracy to defraud a third person. . . . Even in the litigation context, a lawyer cannot shield himself from liability on the ground that he was an agent because no one is justified on that ground in knowingly committing a [wilful] and premeditated fraud for another." [Citations omitted; internal quotation marks omitted.]); *Clark* v. *Druckman*, 218 W. Va. 427, 435, 624 S.E.2d 864 (2005) ("[T]he litigation privilege generally operates to preclude actions for civil damages arising from an attorney's conduct in the litigation process. However, the litigation privilege does not apply to claims of malicious prosecution and fraud."). Indeed, significantly more courts have *declined* to afford absolute immunity to attorneys against claims of fraud than have afforded attorneys such protection.[11] In fact, the majority cites but one such case, *Bennett* v. *Jones*, *Waldo*, *Holbrook & McDonough*, 70 P.3d 17, 34 (Utah 2003), in which the court held that a claim of deceit, which is materially similar to a claim of fraud, is barred by the litigation privilege.[12] Thus, when the various state statutes that except attorney fraud from coverage under the litigation privilege are considered, it is apparent that the vast majority of states that have addressed the issue have declined to extend the privilege to such fraud.[13]

Notably, in its amicus brief, the Connecticut Chapter of the American Academy of Matrimonial Lawyers[14] (Connecticut Chapter), a highly respected organization comprised of many of the finest matrimonial lawyers in this state, takes a similar position, stating: "The Connecticut Chapter is committed to the rule of law and to the uniform administration of justice. The interest of the [amicus] in this case is the protection of the integrity of practice by attorneys in the family courts of Connecticut. To allow attorneys immunity from claims for fraud based on their actions in court, where attorneys should be at the height of their ethical vigilance, would send the wrong message to lawyers. Moreover, it would send the wrong message to the public who relies on the ethical underpinnings of the legal system. Such a ruling would have a particularly pernicious effect on proceedings in family court, where each party is so dependent on proper disclosure by the other." The considerations that the amicus identifies are important ones. See, e.g., *Simms* v. *Seaman*, 129 Conn. App. 651, 674–78, 23 A.2d 1 (2011) (*Bishop*, *J.*, concurring and dissenting) (discussing policy consider-

ations that militate against grant of absolute immunity to attorneys for their allegedly fraudulent misconduct during judicial proceedings). The Connecticut Chapter further suggests that, if this court is not convinced that the elements of the tort of fraud are alone sufficient to shield attorneys from the threat of groundless fraud claims, we should consider steps short of affording attorneys complete immunity. For the foregoing reasons, I believe that the limited immunity that I propose represents the proper balance between the various competing considerations.

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

More important, however, in raising the spectre of a possible increase in the number of such motions and complaints, the majority fails to address the crux of the issue: does this possibility, however remote, make it more likely that attorneys will be deterred from representing the interests of their clients robustly? A litigation privilege is warranted to protect against that eventuality. But even in a system that affords attorneys absolute immunity, they are subject to sanctions and grievances, and I do not see how the truly speculative possibility that a litigant conceivably might be more inclined to file a meritless motion for sanctions or a grievance complaint will adversely affect the manner in which an attorney represents his or her client. After all, we do not presume that attorneys are deterred from aggressively representing their clients for fear that they might be the subject of a baseless motion for sanctions or an unfounded grievance complaint. Indeed, an attor-

ney simply has no control over such frivolous filings, which, on relatively rare occasions, are an unfortunate fact of life for nearly anyone who practices law.

Finally, in dismissing out of hand the option of limited immunity, the majority essentially ignores the competing interests, namely, the private interest of the plaintiff in receiving compensation for the harm attributable to the attorney's fraud, on the one hand, and the public interest in holding dishonest attorneys civilly accountable for their fraudulent misconduct, on the other. In failing to balance the relevant interests, the majority reaches a conclusion that is unfairly weighted in favor of attorneys alleged to have engaged in fraud and against litigants who may have been victimized by that fraudulent conduct. Absolute immunity is unnecessary, and therefore unwarranted, because limited immunity of the kind that I propose would provide attorneys with sufficient protection from the threat of baseless retaliatory actions and, at the same time, afford litigants a reasonable opportunity to obtain recourse against an attorney who has engaged in fraudulent misconduct during the course of a judicial proceeding.[15]

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

Accordingly, I respectfully dissent.

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

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

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

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

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

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

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

the conduct involved in each, that fact alone is sufficient to cast serious doubt on the validity of the majority's decision to adopt absolute immunity for attorney fraud.

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

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

[8] I wish to note my disagreement with the majority's reliance on federal cases holding that judges, prosecutors and witnesses are entitled to absolute immunity under 42 U.S.C. § 1983. In particular, the majority reasons that "[f]ederal decisions [granting absolute] immunity [to] government attorneys and prosecutors acting as officers of the court in . . . actions [under 42 U.S.C. § 1983]" support the conclusion that private attorneys are entitled to the same level of immunity "because, as the United States Supreme Court explained in *Briscoe* v. *LaHue*, 460 U.S. 325, [334–35] 103 S. Ct. 1108, 75 L. Ed. 2d 96 (1983), the litigation privilege at common law protected *all* participants in the court system, and private attorneys were treated no differently than judges, government lawyers and witnesses." (Emphasis in original.) The absolute immunity to which the court in *Briscoe* was referring, however, is the immunity accorded to *defamatory statements* under the litigation privilege. See *Burns* v. *Reed*, supra, 500 U.S. 489–90 ("[l]ike witnesses, prosecutors and other lawyers were absolutely immune from damages liability at common law for making false or defamatory statements in judicial proceedings . . . and also for eliciting false and defamatory testimony from witnesses"); *Briscoe* v. *LaHue*, supra, 331, 335 (absolute common-law privilege pertained to defamatory statements); *Imbler* v. *Pachtman*, 424 U.S. 409, 437–40, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976) (White, J., concurring in judgment) (historically, absolute privilege applied to defamation and malicious prosecution claims against participants in judicial proceedings); see also *Imbler* v. *Pachtman*, supra, 441 (White, J., concurring in judgment) ("[t]here was no absolute immunity at common law for prosecutors other than absolute immunity from suits for malicious prosecution and defamation"). For purposes of determining the extent to which the participants in the judicial process are entitled to absolute immunity from claims under 42 U.S.C. § 1983, *including broad protection from claims other than defamation*, such as malicious prosecution, the United States Supreme Court has employed a functional analysis; see, e.g., *Burns* v. *Reed*, supra, 486 (court employs functional approach to immunity); *Cornejo* v. *Bell*, 592 F.3d 121, 127 (2d Cir.) (functional analysis used to determine whether and to what extent immunity should be accorded public official or participant in judicial process), cert. denied sub nom. *Cornejo* v. *Monn*, U.S. , 131 S. Ct. 158, 178 L. Ed. 2d 243 (2010); "after considering the history of the common law immunity." *Robinson* v. *Volkswagenwerk AG*, 940 F.2d 1369, 1370 (10th Cir. 1991), cert. denied sub nom. *Herzfeld & Rubin* v. *Robinson*, 502 U.S. 1091, 112 S. Ct. 1160, 117 L. Ed. 2d 408 (1992). Thus, as the Supreme Court has explained in recognizing such broad immunity for claims arising out of the conduct of prosecutors "in initiating a prosecution and in presenting the [s]tate's case"; *Imbler* v. *Pachtman*, supra, 431; they, like judges, play a unique role in our justice system; see id., 429; and for reasons directly related to that role, nothing short of complete immunity is adequate to ensure that they are able to discharge their public duty free from concerns of unfounded lawsuits by criminal defendants displeased with their discretionary decisions. Id., 422–24; see also id., 422–23 ("The common-law immunity of a prosecutor is based [on] the same considerations that underlie the common-law immunities of judges and grand jurors acting within the scope of their duties. These include the concern that harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust.").

In granting prosecutors this expansive immunity, "the [c]ourt in *Imbler* declined to accord prosecutors only qualified immunity because, among

other things, suits against prosecutors for initiating and conducting prosecutions could be expected with some frequency, for a defendant often will transform his resentment at being prosecuted into the ascription of improper and malicious actions to the [s]tate's advocate . . . lawsuits would divert prosecutors' attention and energy away from their important duty of enforcing the criminal law . . . prosecutors would have more difficulty than other officials in meeting the standards for qualified immunity . . . and potential liability would prevent the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system . . . ." (Citations omitted; internal quotation marks omitted.) *Burns* v. *Reed*, supra, 500 U.S. 485–86, quoting *Imbler* v. *Pachtman*, supra, 424 U.S. 425, 427–28. Contrary to the majority's assertion, the functional approach that the United States Supreme Court uses in affording prosecutors, as well as judges, grand jurors and witnesses, complete immunity—immunity that includes protection against claims of malicious prosecution—does *not* support the conclusion that attorneys are entitled to that broad immunity. In fact, it militates *against* that conclusion because the United States Supreme Court never has extended to private counsel the same expansive immunity that it has accorded prosecutors, whose special role in our justice system is readily distinguishable from that of private attorneys. See *Burns* v. *Reed*, supra, 487 ("[w]e have been quite sparing in our recognition of absolute immunity . . . and have refused to extend it any further than its justification would warrant" [citation omitted; internal quotation marks omitted]). Indeed, in *Tower* v. *Glover*, 467 U.S. 914, 923, 104 S. Ct. 2820, 81 L. Ed. 2d 758 (1984), the court expressly concluded that the same immunity does not apply to the intentional misconduct of public defenders. In reaching this conclusion, the court explained that, even though public defenders may have certain responsibilities that are similar to those of a judge or prosecutor, at common law, privately retained defense counsel "would have benefited from immunity for defamatory statements made in the course of judicial proceedings" but *not* for intentional misconduct. Id., 922. Thus, as one federal appeals court has explained after carefully reviewing United States Supreme Court precedent on absolute immunity, "while absolute immunity might be afforded [to] government lawyers on these claims [of fraud during a judicial proceeding], such immunity is not available for a private law firm." *Robinson* v. *Volkswagenwerk AG*, supra, 940 F.2d 1371. "While we recognize that prosecutors and government lawyers defending civil actions have been granted absolute immunity on similar claims, the cases do not support an analogous common law tradition for private lawyers." Id., 1372–73. "[The] [p]laintiffs . . . seek to hold [the defendant law firm] liable based [on] allegedly fraudulent statements in the course of discovery and at trial, but we cannot identify a common law precedent for absolute immunity on such claims. The claims asserted are not for defamation and [the law firm] cannot avail itself of the immunity afforded [to] government lawyers responsible for vindicating the public interest. We must conclude that [the law firm] is not entitled to absolute immunity for the [allegedly fraudulent] discovery and litigation statements contained in the plaintiffs' . . . complaint." Id., 1373–74. It is because of the clear and significant differences in the role of a public prosecutor and the role of a private attorney that the former is accorded complete immunity and the latter only limited immunity—differences that the United States Supreme Court and this court expressly have recognized in affording immunity to prosecutors from malicious prosecution claims; see, e.g., *Imbler* v. *Pachtman*, supra, 422–24; *Massameno* v. *Statewide Grievance Committee*, 234 Conn. 539, 567, 663 A.2d 317 (1995); *DeLaurentis* v. *New Haven*, 220 Conn. 225, 242, 597 A.2d 807 (1991); but permitting such claims against other attorneys. If, as the majority asserts, "[t]he rationale for granting absolute immunity to . . . prosecutors is the same as that employed in justifying the litigation privilege for private attorneys in defamation actions," either prosecutors would not be shielded from malicious prosecution claims or private attorneys would be accorded protection from such claims.

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

[10] In his concurring opinion, Justice Eveleigh proposes an approach pursuant to which a plaintiff would be permitted to pursue a fraud action against

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

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

I note that the reasoning of the Hawaii Supreme Court in rejecting a claim that the litigation privilege barred an action for fraud committed during a judicial proceeding is instructive as to why so many states have reached the same conclusion, either judicially or statutorily. See *Matsuura* v. *E. I. du Pont de Nemours & Co.*, supra, 102 Haw. 162. That court reviewed the various relevant considerations, and, although it acknowledged that the history of the case before it "demonstrate[d] how collateral proceedings burden court resources and protract litigation"; id.; it nevertheless determined that, "given (1) the courts' objective of uncovering truth, (2) the injurious effect of fraud on the ability to test the evidence presented, (3) the preference for judgments on the merits, (4) [the] court's duty to discourage abusive litigation practices, and (5) the desire to encourage settlement . . . the interests in (a) avoiding the chilling effect of collateral litigation, (b) reinforcing the finality of judgments, and (c) limiting collateral attacks on judgments are outweighed when fraud is alleged." Id. Accordingly, the court held that "a party is not immune from liability for civil damages based [on] that party's fraud engaged in during prior litigation proceedings." Id.

[12] The majority identifies several cases from other jurisdictions that, it contends, support its decision to extend the litigation privilege to claims of attorney fraud. A review of those cases, however, reveals that only *Bennett* stands for the proposition that attorney fraud should be protected by the litigation privilege. Although the other cases on which the majority relies extend the litigation privilege to claims other than defamation, they simply do not address the question raised by this appeal, namely, whether fraud claims are barred by absolute immunity. See, e.g., *Dory* v. *Ryan*, 25 F.3d 81, 83 (2d Cir. 1994) (absolute immunity for conspiracy to commit perjury applies to prosecutor but not to witness); *Abanto* v. *Hayt, Hayt & Landau, P.L.*, United States District Court, Docket No. 11-24543-CIV (S.D. Fla. September 19, 2012) (in case involving no allegation of fraud, court determined that litigation privilege applied to claim under Florida Consumer Collection Practices Act); *Hahn* v. *United States Dept. of Commerce*, United States District Court, Docket No. 11-6369 (ES) (D.N.J. September 10, 2012) (in case involving no claim of fraud, court determined that litigation privilege barred claims under 42 U.S.C. § 1983 asserted against defendant lawyers and law firms); *Rickenbach* v. *Wells Fargo Bank, N.A.*, 635 F. Sup. 2d 389, 402 and n.10 (D.N.J. 2009) (concluding that litigation privilege applied to claims of negligence and breach of duty of good faith and fair dealing but declining to determine whether privilege applied to claim under Fair Debt Collections Practices Act); *Linder* v. *Brown & Herrick*, 189 Ariz. 398, 406, 943 P.2d 758 (App. 1997) (holding, as court in *Thompson* v. *Paul*, supra,

657 F. Sup. 2d 1122 explained, that fraud claims based on defamation by opposing counsel are barred but fraud claims falling outside of defamation context are not necessarily barred); *Echevarria*, *McCalla*, *Raymer*, *Barrett & Frappier* v. *Cole*, 950 So. 2d 380, 384 (Fla. 2007) (in case involving no claim of fraud, court held that litigation privilege applied to statutory as well as common-law claims); *Levin*, *Middlebrooks*, *Mabie*, *Thomas*, *Mayes & Mitchell*, *P.A.* v. *United States Fire Ins. Co.*, 639 So. 2d 606, 608 (Fla. 1994) (in case involving no claim of fraud, court held that claim of tortious interference with business relationship was barred by litigation privilege).

I also note my disagreement with the majority's reliance on a recent federal case, *Walsh* v. *Law Offices of Howard Lee Schiff*, United States District Court, Docket No. 3:11-cv-1111 (SRU) (D. Conn. September 24, 2012), in which the United States District Court for the District of Connecticut adopted an absolute privilege for purposes of a claim against an attorney under the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq., that the attorney had made certain "false, deceptive, and/or misleading representations in the course of litigating the [a]ction" at issue. (Internal quotation marks omitted.) Id. A review of the decision in *Walsh* reveals that the vast majority of the District Court's analysis is devoted to an unrelated issue of federal law, which, according to the District Court, ultimately required dismissal of the plaintiff's CUTPA claim. The District Court then turned briefly to the state law immunity issue, and, in one short paragraph consisting entirely of citations to several state court cases involving defamation actions, concluded summarily, and as an alternative ground for granting the defendant's motion to dismiss, that the plaintiff's CUTPA claim also was barred by the litigation privilege. In light of the extremely limited nature of the District Court's analysis, I do not think that the majority's reliance on *Walsh* is warranted, especially because the CUTPA action that was the subject of the District Court's ruling was not a true fraud claim, and there is nothing in the decision to suggest that the District Court had considered whether limited immunity, rather than absolute immunity, is appropriate for claims of attorney fraud. To the extent that the majority would treat the CUTPA claim in *Walsh* as a fraud claim because the complaint in that case alleges, inter alia, "false, deceptive, and/or misleading representations"; (internal quotation marks omitted) id.; including "fabricated documents" and a "false affidavit"; (internal quotation marks omitted) id.; the majority's view reflects a fundamental misconception both of the elements of the tort of fraud and the import of a factual allegation in a pleading as distinguished from a cause of action. First, there is nothing in the complaint in *Walsh* alleging that the false, misleading or deceptive statements were *knowingly* false, misleading or deceptive, as is required for purposes of a claim of fraud. Furthermore, even if such knowing falsity had been alleged, the plaintiff in *Walsh* would not have been required to prove it in order to establish a CUTPA violation because CUTPA has no such requirement; under CUTPA, proof of a false, misleading or deceptive statement or conduct would suffice. Finally, a fraud claim must be proven by clear and convincing evidence; see, e.g., *Kilduff* v. *Adams, Inc.*, 219 Conn. 314, 330, 593 A.2d 478 (1991); whereas the standard of proof for a CUTPA claim is a preponderance of the evidence. See, e.g., *Service Road Corp.* v. *Quinn*, 241 Conn. 630, 644, 698 A.2d 258 (1997). Consequently, a CUTPA claim, and, in particular, the CUTPA claim at issue in *Walsh*, is in no respect similar or analogous to a fraud claim. The decision in *Walsh* therefore provides no support for the majority's holding.

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

than twenty jurisdictions have rejected the litigation privilege for claims of fraud; the majority identifies one jurisdiction that grants absolute immunity for such claims.

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

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

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

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