11-11

To Be Argued By:
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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 11-11

MARK E. VILLENEUVE,
Plaintiff-Appellant,

-vs-

STATE OF CONNECTICUT, SALVATORE DIPIANO, RICHARD FLORENTINE, FRANCES DERA, PATRICIA KING, MEMBERS OF THE WINDHAM GRIEVANCE PANEL, JULIA AURIGEMMA, JUDGE,

(For continuation of Caption, See Inside Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

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REDACTED BRIEF FOR
THE UNITED STATES OF AMERICA
AND ERNESTI MATTEI

==========

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Defendants-Appellees.

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Statement of Jurisdiction

The district court (Janet B. Arterton, J.) had subject matter jurisdiction over this civil case arising under federal law pursuant to 28 U.S.C. § 1331. The district court issued a final decision granting the motions to dismiss of all of the defendants on December 2, 2010. Judgment entered on December 3, 2010. Government's Appendix ("GA") at 6. On December 30, 2010, the plaintiff filed a timely notice of appeal pursuant to Fed. R. App. P. 4(a). GA at 6. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

Statement of Issue
Presented for Review

Did the district court properly grant the federal defendants' motion to dismiss the plaintiff's First and Fifth Amendment claims that Connecticut Rules of Professional Conduct 8.4(3) and 8.4(4), as recognized by the United States District Court for the District of Connecticut, are unconstitutional on their face?

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 11-11

MARK E. VILLENEUVE,
Plaintiff-Appellant,

-vs-

STATE OF CONNECTICUT, SALVATORE DIPIANO, RICHARD FLORENTINE, FRANCES DERA, PATRICIA KING, MEMBERS OF THE WINDHAM GRIEVANCE PANEL, JULIA AURIGEMMA, JUDGE, RICHARD BLUMENTHAL, BARBARA M. QUINN, JUDGE, ANDREW NORTON, CONNECTICUT STATEWIDE GRIEVANCE COMMITTEE, MICHAEL FEDELE, MARK DUBOIS, ERNESTI J. MATTEI, OFFICIAL CAPACITY, UNITED STATES OF AMERICA,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

REDACTED BRIEF FOR
THE UNITED STATES OF AMERICA
AND ERNESTI MATTEI

Preliminary Statement

In February 2008, the plaintiff, Mark E. Villeneuve, an attorney appearing *pro se*, interviewed for a staff position with a Connecticut state agency, which subsequently discovered misrepresentations in his resume. Agency personnel referred the matter to the Statewide Grievance Committee, which in turn referred the matter to local grievance panels. In January 2009, a finding of probable cause was issued that the plaintiff had violated Connecticut Rules of Professional Conduct 8.3(3) and 8.4(4), which state that "[i]t is professional misconduct for a lawyer to: . . . (3) [e]ngage in conduct involving dishonesty, fraud, deceit or misrepresentation; [or] (4) [e]ngage in conduct that is prejudicial to the administration of justice." *Id.* In January 2010, the Connecticut Superior Court suspended the plaintiff from the practice of law without prejudice, and in February 2011, the Connecticut Appellate Court affirmed the suspension.

The plaintiff initially brought suit in federal court against a variety of different state defendants who were involved in one way or another with his suspension. He alleged violations of the First, Fifth, and Fourteenth Amendments, pursuant to 42 U.S.C. § 1983, and violations of provisions of the Connecticut Constitution. He then amended his complaint to add the two federal defendants as parties. Plaintiff's sole claims regarding the federal defendants were that Rule 8.4(3) and Rule 8.4(4) are constitutionally invalid on their face pursuant to the First and Fifth Amendments.

The federal defendants moved to dismiss in their entirety the claims asserted against them, and the district court (Janet B. Arterton, J.) granted the motion, finding that Rules 8.4(3) and 8.4(4) are facially constitutional. Plaintiff pursues *de novo* in this Court the same arguments he raised in the district court against the federal defendants. For the reasons that follow, the plaintiff's challenges to the facial constitutionality of the two rules have no merit.

Statement of the Case

On March 1, 2010, the plaintiff brought suit against the State of Connecticut and state officials alleging various claims regarding his suspension by the Connecticut Superior Court from the practice of law for violations of Rules 8.4(3) and 8.4(4). GA at 3. On May 21, 2010, the plaintiff filed an amended complaint adding as defendants the United States of America and Ernesti Mattei, sued in his official capacity as the Chair of the Federal Grievance Committee for the United States District Court for the District of Connecticut. GA at 4, 11, 61-64. The amended complaint alleged only four counts against the federal defendants, each of which challenged the facial constitutionality of either Rule 8.4(3) or Rule 8.4(4) pursuant to the First and Fifth Amendments. GA at 61-64.

On June 10, 2010, the state defendants moved pursuant to Fed. R. Civ. P. 12(b)(1) and (6) to dismiss the amended complaint. GA at 4. The federal defendants moved to dismiss the pleading on October 6, 2010 pursuant to Rule 12(b)(6). GA at 5. On December 2, 2010, the district court

granted the defendants' Rule 12(b) motions in their entirety. GA at 6. Judgment for all of the defendants entered on December 3, 2010. GA at 6.

The plaintiff filed a timely notice of appeal on December 30, 2010. GA at 6. He limits his appeal to the district court's decision regarding the federal defendants' motion to dismiss and makes no claims as to the court's decision regarding the state defendants.

Statement of Facts and Proceedings Relevant to this Appeal

I. State Administrative and Judicial Proceedings

The plaintiff, an attorney appearing *pro se* in this Court and during the proceedings in the district court, interviewed in February 2008 for a staff attorney position at the Connecticut Workers' Compensation Commission ("CWCC"). GA at 86. After the interview, CWCC personnel discovered several misrepresentations in the resume that he had submitted as part of the employment application process. GA at 86. In May 2008, the CWCC notified the Statewide Grievance Committee ("SGC") about its findings, and the SGC subsequently referred the matter to the Hartford/New Britain Grievance Panel ("HNB Grievance Panel"). GA at 86-87, 92.

The HNB Grievance Panel mailed a copy of the SGC referral to the plaintiff, seeking a response to the CWCC findings. GA at 92. The plaintiff responded by claiming that he had neither applied for the CWCC staff attorney

position, nor interviewed with the CWCC, claiming instead that he was the victim of identity theft and that an imposter applied and interviewed for the position. GA at 87, 93.

After receiving no response from the plaintiff on a follow-up request for information, the HNB Grievance Panel filed a complaint against him. GA at 93. The complaint was forwarded to the SGC, which in turn referred it to the Windham Judicial District Grievance Panel ("Windham Panel"). GA at 93. On January 6, 2009, the Windham Panel issued a finding of probable cause that the plaintiff had violated Rules 8.4(3) and 8.4(4) of the Connecticut Rules of Professional Conduct, which read in full as follows:

> It is professional misconduct for a lawyer to:
> . . .
> (3) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation; [or]
> (4) Engage in conduct that is prejudicial to the administration of justice.

GA at 84, 93.

A reviewing committee of the SGC heard the complaint on June 11, 2009. GA at 93. The plaintiff did not attend the hearing, but he submitted written material that was admitted into evidence. In its August 21, 2009 written decision, the reviewing committee found by clear and convincing evidence that the plaintiff had violated

Rule 8.4(3). GA at 87-88, 93-94. The reviewing committee then directed SGC disciplinary counsel to file a presentment against the plaintiff in Connecticut Superior Court for imposition of whatever discipline the court in its discretion might deem appropriate. GA at 88, 94.

The presentment was filed on or about November 11, 2009 pursuant to both Rules 8.4(3) and 8.4(4). GA at 18. On November 24, 2009, the plaintiff moved to dismiss the presentment on jurisdictional grounds, and he simultaneously moved for summary judgment on the grounds that the two rules are unconstitutionally broad and void for vagueness. GA at 18, 94. The state superior court held a hearing on the two motions on December 21, 2009. GA at 18, 94. The plaintiff was not present for the hearing, and he had not obtained a continuance or permission to be absent. GA at 94, 96, 102. The court orally denied both motions at the conclusion of the hearing. GA at 94, 96, 102. As to the plaintiff's constitutional challenge to Rules 8.4(3) and 8.4(4), the court concluded, in a written articulation dated March 16, 2010, that the plaintiff was not entitled to summary judgment as a matter of law and that he had "provided no law to support his claim that the courts of this state or any other state had found that Rules 8.4(3) and 8.4(4) were unconstitutionally broad." GA at 96.

The plaintiff's presentment hearing took place on January 22, 2010, but he was not present at the proceeding. GA at 105. The hearing proceeded in the plaintiff's absence, and, at the conclusion of the hearing, the court suspended the plaintiff "from the practice of law without

prejudice because he failed to appear at the presentment. The court will consider reinstatement if respondent appears and establishes good cause for his failure to appear at the hearing." GA at 110, 112. In a subsequent written articulation of the January 22nd oral order of suspension, the court stated: "Had the respondent appeared, on that date or on a subsequent date, the court would have entertained his motion to vacate suspension, and would have held a hearing on the merits. But the respondent has never appeared at any proceeding." GA at 98.

On January 28, 2010, the plaintiff appealed the Connecticut Superior Court's order of suspension. GA at 19. He did not, however, challenge the constitutionality of Rules 8.4(3) and 8.4(4). On February 22, 2011, the Connecticut Appellate Court affirmed the trial court's suspension of the plaintiff's license to practice law. *See Disciplinary Counsel v. Villeneuve,* 14 A.3d 358 (Conn. App. 2011) (copy provided at GA 113-23).

The plaintiff is a member of the bar of the United States District Court for the District of Connecticut. GA at 72. [redacted]

[redacted]

II. Plaintiff's Federal Suit

The plaintiff filed his initial complaint on March 1, 2010 against the State of Connecticut and multiple state officials. GA at 3. He alleged 31 counts regarding his suspension from the Connecticut bar for violation of Rules 8.4(3) and 8.4(4). The gist of the plaintiff's allegations against the state defendants was that he was denied various federal and state constitutional rights during the state administrative and judicial disciplinary proceedings. He also asserted state statutory and common law causes of action against several of the state defendants. GA at 10-72.[1]

The plaintiff filed an amended complaint on May 21, 2010, adding as parties the United States of America and Ernesti Mattei, sued in his capacity as Chair of the FGC. GA at 4. The amended complaint contained no specific allegations against the federal defendants and mentions them only in Counts 32 through 35. Count 32 alleged that

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[1] This citation references plaintiff's amended complaint, which added the federal defendants as parties, but contained the identical allegations against the state defendants as those asserted in the initial complaint.

Rule 8.4(3) is overbroad and therefore constitutionally infirm under the First Amendment; Count 33 alleged the same allegation as to Rule 8.4(4). GA at 14, 61-62. Count 34 alleged that Rule 8.4(3) violates the Fifth Amendment because the rule is void for vagueness; Count 35 alleged the same allegation as to Rule 8.4(4).[2] GA at 62-64.

The state defendants moved on June 10, 2010 to dismiss the amended complaint pursuant to Fed. R. Civ. P. 12(b)(1) and (6), arguing that the district court should abstain from issuing relief during the pendency of the plaintiff's state court appeal. GA at 4 (docket entry). On October 6, 2010, the federal defendants moved pursuant to Rule 12(b)(6), arguing that Connecticut Rules of Professional Conduct 8.4(3) and 8.4(4) are not facially unconstitutional. GA at 5 (docket entry). On November 18, 2010, the district court heard oral argument on the Rule 12(b) motions. GA at 5-6.

On December 2, 2010, the district court (Janet B. Arterton, J.) issued a written ruling granting the defendants' Rule 12(b) motions in full. GA at 129-48. As to the federal defendants' motion, the court initially noted that, though the United States District Court for the District of Connecticut "'recognizes the 'Rules of

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[2] In both his initial and amended pleadings the plaintiff asserted against the state defendants essentially the same constitutional causes of action regarding Rules 8.4(3) and 8.4(4) that he asserted against the federal defendants in the amended complaint. GA at 27-30.

Professional Conduct' as approved by the Judges of the Connecticut Superior Court as expressing the standards of professional conduct expected of lawyers practicing in the District of Connecticut," the "'interpretation'" of the Rules "'by any authority other than the United States Supreme Court, the United States Court of Appeals for the Second Circuit and the United States District Court for the District of Connecticut shall not be binding on disciplinary proceedings initiated in the United States District Court for the District of Connecticut.'" GA at 5 (quoting D. Conn. L. Civ. R. 83.2(a)(1)). The district court further stated that, although Rules 8.4(3) and 8.4(4) regulating the conduct of lawyers practicing in federal court pursuant to D. Conn. L. Civ. R. 83.2 "are substantively the same as the Connecticut Rules of Professional Responsibility, the two sets of rules are distinct and can be interpreted separately by the federal and state courts respectively." GA at 5.

The court next addressed the facial constitutionality of Rules 8.4(3) and 8.4(4), concluding first that both rules are not overbroad, especially when construed with the "helpful guidance" provided by the Supreme Court in *In re Snyder,* 472 U.S. 634 (1985), which held, in part, that restrictions on lawyers' conduct "must be read in light of the 'complex code of behavior' to which attorneys are subject" and "the traditional duties imposed on an attorney." GA at 6-8 (quoting *Snyder,* 472 at 634-35). The district court concluded that Rules 8.4(3) and 8.4(4), when construed "in light of the traditional roles of lawyers and in a manner relevant to law practice, do not reach a substantial amount of protected activity, if any, and potential overly-broad

applications of the rules can be dealt with through as-applied challenges." GA at 8.

The district court also held that Rules 8.4(3) and 8.4(4) are not void for vagueness. According to the court, the two rules "'appl[y] only to lawyers, who are professionals and have the benefit of guidance provided by case law, court rules and the 'lore of the profession.'" GA at 10 (quoting *Howell v. State Bar of Texas,* 843 F.2d 205, 208 (5th Cir. 1988)). Moreover, the court stated that the rules in question "are limited to conduct that is relevant to and based on the practice of law, and therefore lawyers are sufficiently on notice of what the rules proscribe." GA at 10-11.

Judgment entered on the docket for both the federal and state defendants on December 3, 2010. GA at 6.

Summary of Argument

The district court properly granted the federal defendants' motion to dismiss the plaintiff's claims that Connecticut Rules of Professional Conduct 8.4(3) and 8.4(4) are unconstitutional on their face. The court correctly held that the plaintiff could not satisfy his rigorous burden of establishing that the two rules are overbroad and void for vagueness pursuant to the First and Fifth Amendments. The court also properly recognized that restrictions on attorneys' conduct embodied in rules of professional conduct cannot be construed in a vacuum, but must instead be read in light of the complex code of behavior that attorneys are subject to as officers of the

court. When the court considered and measured the rules in question in that light, they easily passed constitutional muster. Also significant is the fact that the plaintiff could not, and has not, identified a single federal or state case in which a court has struck down as unconstitutional other jurisdictions' identical counterparts to the two rules at issue here. In fact, multiple state appellate courts, and the Court of Appeals for the Fifth Circuit have upheld the constitutionality of those identical counterparts.

This Court should affirm the district court's dismissal of the plaintiff's claims against the federal defendants.

Argument

I. Connecticut Rules of Professional Conduct 8.4(3) and 8.4(4) Are Constitutional On Their Face.

A. Relevant facts

The relevant facts are set forth above in the Statement of Facts.

B. Governing law and standard of review

1. Grievance procedure

The Connecticut Rules of Professional Conduct were adopted in 1986 as a version of the American Bar Association's Model Rules of Professional Conduct ("Model Rules"). *See O'Brien v. Stolt-Nielsen Transp. Group Ltd.*, 838 A.2d 1076, 1086 (Conn. Supp. 2003).

Connecticut's Rules of Professional Conduct 8.4(3) and 8.4(4) are substantively identical to Model Rules 8.4(c) and 8.4(d), respectively. *See* ABA Model Rules of Professional Conduct, Model Rules 8.4(3) and (4) (2010) ("It is professional misconduct for a lawyer to: . . . (d) engage in conduct involving dishonesty, fraud, deceit or misrepresentation," or "(4) engage in conduct that is prejudicial to the administration of justice"). In turn, Model Rules 8.4(c) and 8.4(d) are substantively identical to Disciplinary Rules ("DR") 1-102(A)(4) and 1-102(A)(5), respectively, of the ABA's earlier Model Code of Professional Responsibility. *See* ABA Model Code of Professional Responsibility, DR 1-102(A)(4) and (5) (1983) ("A lawyer shall not: . . . (4) [e]ngage in conduct involving dishonesty, fraud, deceit, or misrepresentation," or "(5) [e]ngage in conduct that is prejudicial to the administration of justice").

Connecticut Rule of Professional Conduct 8.4 reads, in pertinent part, "It is professional misconduct for a lawyer to: . . . (3) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation; [or] (4) Engage in conduct that is prejudicial to the administration of justice." *Id*. The United States District Court for the District of Connecticut, in exercising its inherent power to regulate the conduct of lawyers admitted to its bar, "recognizes the authority of the 'Rules of Professional Conduct,' as approved by the Judges of the Connecticut Superior Court as expressing the standards of professional conduct expected of lawyers practicing in the District of

Connecticut."[3] D. Conn. L. Civ. R. 83.2(a)1. Rule 8.4, therefore, applies to lawyers practicing before the district court in Connecticut.

D. Conn. L. Civ. R. 83.2 requires that counsel for the FGC, upon learning that discipline has been imposed "by order of the Courts of Connecticut or any other state or federal Court" on an attorney admitted to the District Court bar, "shall institute a presentment . . . petitioning the [District] Court to impose the identical discipline upon . . . the attorney receiving such disciplinary action. . . ." *Id.* § 83.2(f)(2). The local rule also provides that the District Court, "after hearing, shall require the resignation of the attorney or shall impose the identical discipline" unless the District Court finds any of four specified defects "on the face of the record upon which the discipline in the another jurisdiction is predicated." *Id.* Rule 83.2(f)(2) specifies the following four defects:

> a. that the procedure was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or

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[3] Connecticut's state courts also "possess[] inherent authority to regulate attorney conduct and to discipline the members of the bar." *Heslin v. Connecticut Law Clinic of Trantolo & Trantolo,* 461 A.2d 938, 944 (Conn. 1983); *see also Statewide Grievance Committee v. Rozbicki,* 558 A.2d 986, 988-89 (Conn. 1989) (attorneys have "unique position as officers and commissioners of the court" such that it places them "in a special relationship with the judiciary and subjects them to discipline") (citations and internal quotations omitted).

b. that there was such an infirmity of proof establishing the misconduct as to give rise to the clear conviction that the Court could not, consistent with its duty, accept as final the discipline imposed; or

c. that the imposition of the same discipline by the Court would result in grave injustice; or

d. that the misconduct established is deemed by the Court to warrant substantially different discipline.

Id.[4]

2. First and Fifth Amendment challenges

In *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.,* 455 U.S. 489 (1982) (*Hoffman)*, the Supreme Court considered a First Amendment facial challenge to the overbreadth and vagueness of a municipal ordinance. The Court succinctly set forth the standards governing review of facial challenges to proscribed conduct:

> In a facial challenge to the overbreadth and vagueness of a law, a court's first task is to determine whether the enactment reaches a

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[4] The Connecticut Superior Court has also adopted reciprocal discipline procedures for attorneys admitted to the Connecticut bar who are disciplined in other jurisdictions. *See* Connecticut Practice Book § 2-39.

> *substantial* amount of constitutionally protected conduct. If it does not, then the overbreadth challenge must fail. The court should then examine the facial vagueness challenge and, assuming the enactment implicates no constitutionally protected conduct, should uphold the challenge *only* if the enactment is impermissibly vague in *all* of its applications.

Id. at 494-95 (emphases added). In *United States v. Williams,* 553 U.S. 285 (2008), the Supreme Court reiterated this standard and emphasized other applicable considerations in constitutional overbreadth and void-for-vagueness challenges. The *Williams* Court made clear that it is no easy task for a challenging party to overturn a proscription on overbreadth grounds: "[W]e have vigorously enforced the requirement that a statute's overbreadth be *substantial*, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep. . . . Invalidation for overbreadth is 'strong medicine' that is not to be 'casually employed.'" *Id.* at 292-93 (citations and some internal quotations omitted) (emphasis in original); *see also Virginia v. Hicks,* 539 U.S. 113, 118-19 (2003) (a finding of overbreadth invalidates all enforcement of a challenged proscription, unless the law can be salvaged by a limiting construction); *United States v. Farhane,* 634 F.3d 127, 136-37 (2d Cir. 2011) (citing *Williams* and *Hicks* regarding applicable overbreadth standard of review, and noting that "the law rigorously enforces the burden on the challenging party to demonstrate 'substantial' infringement").

The *Williams* Court also elaborated on the void-for-vagueness doctrine, noting that the doctrine is premised on the Fifth Amendment's Due Process clause, and that "ordinarily '[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others.'" *Id.* at 304 (quoting *Hoffman,* 455 U.S. at 494-95 & nn. 6 & 7). The *Williams* Court noted that a facial void-for-vagueness challenge can be asserted in the First Amendment context, however, to the extent that a plaintiff is permitted "to argue that a statute is overbroad because it is unclear whether it regulates a substantial amount of protected speech." 553 U.S. at 304. The Court cautioned, however, that "'*perfect* clarity and *precise* guidance have never been required even of regulations that restrict expressive activity.'" *Id.* (quoting *Ward v. Rock Against Racism,* 491 U.S. 781, 794 (1989)) (emphases added).

3. Standard of review

This Court reviews constitutional claims *de novo. See Guo Qi Wang v. Holder,* 583 F.3d 86, 90 (2d Cir. 2009).

C. Discussion

The plaintiff cannot satisfy the constitutional burdens he must overcome in his facial challenges to Rules 8.4(3) and 8.4(4). To be adjudged constitutionally overbroad, a law must "punish[] a substantial amount of protected free speech, judged in relation to [its] plainly legitimate sweep." *Virginia v. Hicks,* 539 U.S. 113, 118-19 (2003). The district court correctly held that Rules 8.4(3) and

8.4(4), when construed "in light of the traditional roles of lawyers and in a manner relevant to law practice, do not reach a substantial amount of protected activity, if any, and potential overly-broad applications of the rules can be dealt with through as-applied challenges." GA at 136. The district court also correctly held that the two rules are not void for vagueness. According to the court, the two rules "'appl[y] only to lawyers, who are professionals and have the benefit of guidance provided by case law, court rules and the "lore of the profession.'" GA at 138 (quoting *Howell*, 843 F.2d at 208).

The Supreme Court, in *In re Snyder,* 472 U.S. 634, 645 (1985), recognized the plainly legitimate sweep of rules of professional conduct that are applicable to attorneys. Federal courts may regulate, in the exercise of their inherent power, the conduct of attorneys appearing in federal court. *Id.* n.6 (1985); *accord Chambers v. NASCO, Inc.,* 501 U.S. 32, 43 (1991)("[A] federal court has the power to control admission to its bar and to discipline attorneys who appear before it"); *In re Jacobs,* 44 F.3d 84, 87 (2d Cir. 1994) (holding that a district court's authority to discipline attorneys admitted to its bar is an inherent power of the court). The inherent power to regulate "derives from the lawyer's role as an officer of the court which granted admission." *Snyder,* 472 U.S. at 643 (citing *Theard v. United States,* 354 U.S. 278, 281 (1957)).

The petitioner in *Snyder* had been suspended from the practice of law for violation of a federal appellate rule prohibiting "conduct unbecoming a member of the bar of the court." 472 U.S. at 643-44. Although the *Snyder* Court

eventually concluded that the petitioner's criticisms of aspects of the Criminal Justice Act did not warrant disciplinary action, the Court elaborated on how "conduct unbecoming a member of the bar of the court" should be construed. According to the Court, this phrase "*must* be read in light of the 'complex code of behavior' to which attorneys are subject." *Id.* at 644 (quoting *In re Bithoney,* 486 F.2d 319, 324 (1st Cir. 1973)) (emphasis added). The complex code of behavior "reflects the burdens inherent in the attorney's dual obligations to clients and to the system of justice." 472 U.S. at 644. In making clear that the bar rule in question could not be construed in a vacuum, the *Snyder* Court continued:

> Read in light of the traditional duties imposed on an attorney, it is clear that 'conduct unbecoming a member of the bar' is conduct contrary to professional standards that shows an unfitness to discharge continuing obligations to clients or the courts, or conduct inimical to the administration of justice. *More specific guidance is provided by case law, applicable court rules, and 'the lore of the profession,' as embodied in codes of professional conduct.*

Id. at 645 (emphasis added). In addition, the *Snyder* Court noted, a federal court is entitled to expect that an attorney admitted to a federal bar has "knowledge of and the duty to conform to the [applicable] state code of professional responsibility" because "[t]he uniform first step for admission to any federal court is admission to a state court." *Id.* n.6.

Although it does not appear that any Connecticut appellate court has ruled on the constitutionality of Rule 8.4(3) or 8.4(4),[5] the Connecticut appellate courts have not hesitated to affirm findings supporting violations of the two rules. *See, e.g., Statewide Grievance Comm. v. Burton,* 10 A.3d 507, 513 (Conn. 2011) (upholding finding of Rule 8.4(4) violation by attorney who had made allegations of judicial misconduct without any objective factual support and rejecting attorney's claim of constitutionally-protected speech)*; Notopoulos v. Statewide Grievance Comm.,* 890 A.2d 509, 520 (Conn. 2009) (finding it "well established" under Rule 8.4(4) that attorneys admitted to Connecticut bar must "conduct themselves in a manner compatible with the role of courts in the administration of justice") (internal quotation omitted); *Haymond v. Statewide Grievance Comm.,* 723 A.2d 808, 809 (Conn. 1999)(per curiam) (affirming petitioner's Rule 8.4(3) reprimand for false and misleading professional advertising); *Henry v. Statewide Grievance Comm.,* 957 A.2d 547, 555 (Conn. App. 2008)("[G]iven the wide variety of conduct to which rule 8.4(4) has been applied," an attorney's "misrepresentation that induced the court to take action it otherwise would not have taken" was sufficient to form the foundation of a Rule 8.4(4) violation); *Ansell v. Statewide Grievance Comm.,* 865

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[5] However, the Connecticut Superior Court, in its ruling on the plaintiff's motion for summary judgment in the state court proceedings resulting in his suspension from the practice of law, did hold that the plaintiff had not met his burden of demonstrating that Rules 8.4(3) and 8.4(4) are constitutionally deficient. GA at 96.

A.2d 1215, 1223 (Conn. App. 2005) (Rule 8.4 focuses on conduct indicating "lack of those characteristics relevant to law practice," including fraud and dishonesty; attorney engaged in conduct involving misrepresentation precluded by Rule 8.4(3))(citation omitted); *Statewide Grievance Comm. v. Egbarin,* 767 A.2d 732, 741 (Conn. App. 2001)(five-year bar suspension for Rule 8.4(3) violations was not abuse of discretion because attorney had engaged in misrepresentations and nondisclosures). Even a cursory review of such cases reveals that the Connecticut courts were attendant, implicitly if not explicitly, to the "case law, applicable court rules, and the 'lore of the profession'" that are "embodied in codes of professional conduct" and which guide construal of such codes. *Snyder,* 472 U.S. at 645.

1. Rule 8.4(4)

Model Rule 8.4(d) and DR 1-102(A)(5), the identical counterparts to Connecticut Rule 8.4(4), have withstood constitutional challenges for overbreadth and vagueness in numerous courts. The leading federal case is *Howell v. State Bar of Texas,* 843 F.2d 205, 208 (5th Cir. 1988), where the United States Court of Appeals for the Fifth Circuit upheld the facial constitutionality of Texas's DR 1-102(A)(5), which provided in pertinent part that a lawyer shall not "[e]ngage in conduct that is prejudicial to the administration of justice." Writing for the unanimous three-judge panel, Judge Van Graafeiland of the United States Court of Appeals for the Second Circuit, sitting by designation, initially noted that the language in DR 1-102(A)(5) "is not peculiar to the State of Texas," and that

the DR "was part of the American Bar Association's Code of Professional Responsibility promulgated in 1969 and subsequently adopted by almost every State in the Union." 843 F.2d at 206. The *Howell* court continued:

> There is nothing startlingly innovative in DR 1-102(A)(5)'s contents. Since the early days of English common law, it has been widely recognized that courts possess the inherent power to regulate the conduct of attorneys who practice before them and to discipline or disbar such of those attorneys as are guilty of unprofessional conduct.

Id. (citations omitted).

After a review of Texas legislative and judicial commentary on the role of lawyers, the *Howell* court concluded that "[t]he Texas cases which both antedated and followed the adoption of DR 1-102(A)(5) demonstrate quite clearly that the State's primary concern consistently has been with the obligation of lawyers in their quasi-official capacity as 'assistants to the court.'" *Id.* at 207 (citation omitted). In addition, before taking up the plaintiff's facial constitutional challenges to DR 1-102(A)(5), the *Howell* court opined that "[s]o far as we can determine," the State of Texas demands under the DR what the United States Supreme Court had described in its *Snyder* decision as a lawyer's role in the administration of justice:

> As an officer of the court, a member of the bar enjoys singular powers that others do not possess; by virtue of admission, members of the bar share a kind of monopoly granted only to lawyers. Admission creates a license not only to advise and counsel clients but also to appear in court and try cases; as an officer of the court, a lawyer can cause persons to drop their private affairs and be called as witnesses in court, and for depositions and other pretrial processes that, while subject to the ultimate control of the court, may be conducted outside courtrooms. The license granted by the court requires members of the bar to conduct themselves in a manner compatible with the role of courts in the administration of justice.

Id. at 208 (quoting *Snyder,* 472 U.S. at 644-45).[6]

With this framework for construing the language of DR 1-102(A)(5) in place, the *Howell* court turned to the plaintiff's argument that the DR was overbroad. The court noted that overbreadth is "'strong medicine'" to be found

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[6] As noted above, the *Snyder* Court also concluded that "conduct unbecoming a member of the bar" is synonymous with "conduct inimical to the administration of justice," and that "[m]ore specific guidance" as to the parameters of these terms "is provided by case law, applicable court rules, and 'the lore of the profession,' as embodied in codes of professional conduct." 472 U.S. at 645. It is also not too much of a stretch to construe "inimical" and "prejudicial," as the latter term is used in DR-102(A)(5), Model Rule 8.4(d), and Connecticut Rule 8.4(4), as synonymous.

"'sparingly and only as a last resort.'" *Id.* at 208 (quoting *Bates v. State Bar of Arizona,* 433 U.S. 601, 613 (1977) (internal cite omitted)). According to the *Howell* court, "a law should not be invalidated for overbreadth unless it reaches a substantial number of impermissible applications,'" 843 F.2d at 209 (quoting *New York v. Ferber,* 458 U.S. 747, 771 (1982)), a situation not present in the instant matter because "Texas consistently has applied the doctrine of DR 1-102(A)(5) to attorneys in their functions as officers of the court and has recognized its obligation to make such application consistent with the demands of the [United States] Constitution." 843 F.2d at 209.

The *Howell* court also made short work of the plaintiff's argument that DR 1-102(A)(5) was unconstitutionally vague on its face:

> The traditional test for vagueness in regulatory prohibitions is whether 'they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest'. . . The particular context in which a regulation is promulgated therefore is all important . . . *The regulation at issue herein applies only to lawyers, who are professionals and have the benefit of guidance provided by case law, court rules and the 'lore of the profession.'*

843 F.2d at 208 (internal citations omitted)(emphasis added). The court also noted that although DR 1-

102(A)(5) "might be considered vague in some hypothetical, peripheral application," such a possibility would not "warrant throwing the baby out with the bath water. To invalidate the regulation in toto, as appellant would have us do, we would have to hold that it is impermissibly vague in all of its applications," a conclusion the court was "not prepared" to reach. *Id.* (citations omitted).

The plaintiff has not identified any cases that have found Rule 8.4(4), Model Rule 8.4(d), or DR 1-102(A)(5) unconstitutionally overbroad or void for vagueness. Though *Howell* appears to be the only federal appellate decision to have addressed the constitutionality of an identical counterpart to Rule 8.4(4), there are several state appellate court decisions that have recognized the unique nature of bar membership and have turned aside constitutional challenges to such counterparts. For example, in *In re Comfort,* 159 P.3d 1011, 1023-27 (Kan. 2007), the Kansas Supreme Court upheld Rule 8.4(d) from constitutional as applied challenges for vagueness and overbreadth, noting that "[a] lawyer's right to free speech is tempered by his or her obligation to both the courts and the bar, an obligation ordinary citizens do not undertake." Likewise, in *Committee on Legal Ethics of the West Virginia State Bar v. Douglas,* 370 S.E.2d 325, 328 (W. Va. 1988), the Supreme Court of Appeals of West Virginia held that DR 1-102(A)(5) was not void for vagueness because "the standard is considered in light of the

traditions of the legal profession and its established practices."[7]

In addressing constitutional challenges to disciplinary rules that are counterparts to Connecticut's Rule 8.4(4), *Howell* and all of the cited state appellate decisions recognized the traditions of the bench and bar, as well as the unique role that attorneys occupy in the administration of justice, in concluding that these special factors must

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[7] *See also Rogers v. Mississippi Bar,* 731 So. 2d 1158, 1170-71 (Miss. 1999) (finding Rule 8.4(d) to be constitutional and concluding that application of the rule is consistent with that adopted in *Howell* case); *In re Meyer,* 970 P.2d 652, 654 (Or. 1999) (finding that state's pertinent disciplinary rule was "sufficiently definite to withstand" such a vagueness challenge); *In re Stanbury,* 561 N.W.2d 507, 512 (Minn. 1997)(upholding Rule 8.4(d) and finding that "broad standards of professional responsibility are necessary"); *Attorney Grievance Commission of Maryland v. Goldsborough,* 624 A.2d 503, 510 (Md. 1993)(relying on *Snyder* and *Howell* to find Rule 8.4(d) to be "sufficiently definite to pass constitutional muster"); *In re Hinds,* 449 A.2d 483, 497-98 (N.J. 1982) (commenting, as to DR 1-102(A)(5), that "a broad disciplinary rule may acquire constitutional certitude when examined in light of traditions in the profession and established patterns of application"); *In re Keiler,* 380 A.2d 119, 126 (D.C. App. 1977) (finding that DR 1-102(A)(5), because it was "written by and for lawyers," "need not meet the precise standards of clarity that might be required of rules of conduct for laymen").

inform construction and application of a jurisdiction's rules of professional conduct. Connecticut Rule of Professional Conduct 8.4(4) must also be construed in this light, and, when it is, it is evident that Rule 8.4(4) is neither overbroad, nor void for vagueness and is therefore constitutional on its face.

2. Rule 8.4(3)

Though there is little case law on constitutional challenges to Connecticut Rule 8.4(3) or its identical counterparts, Model Rule 8.4(c) and DR 1-105(A)(4), the lessons of *Snyder* and *Howell* regarding the construction and interpretation of rules of professional conduct are equally applicable to Rule 8.4(3)'s proscription that "[i]t is professional misconduct for a lawyer to . . . (3) [e]ngage in conduct involving dishonesty, fraud, deceit or misrepresentation." Connecticut Rule of Professional Conduct 8.4(3). As with other rules of professional responsibility, Rule 8.4(3) and its identical counterparts were drafted by and for lawyers, and constitutional challenges to them must be analyzed with the "'lore of the profession'" in mind; in addition, the interpretation of rules of professional conduct includes "specific guidance" in the form of "case law" and "applicable court rules." *Snyder,* 472 U.S. at 645; *Howell,* 843 F.2d at 208.

Connecticut's Rules of Professional Conduct contain a terminology section, in which the word "fraud" in Rule 8.4(3) is defined as "conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive." Connecticut Rules of

Professional Conduct 1.0(e). GA at 76. The common law "essential elements" of fraud are "well-settled" in Connecticut:

> (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[.]

H & L Chevrolet, Inc. v. Berkley Ins. Co., 955 A.2d 565, 574 (Conn. App. 2008). The Official Commentary to Rule 1.0 expands on the use of the term "fraud" in the Connecticut Rules of Professional Conduct, however, noting that "fraud" does "not include merely negligent misrepresentation or negligent failure to apprise another of relevant information. For purposes of these Rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform."[8] GA at 77. Moreover, the Official Commentary to Rule 8.4 lists "fraud" as an example of one of the "[m]any kinds of illegal conduct [that] reflect adversely on fitness to practice law. . . ." GA at 84. There can be no serious argument made that attorneys admitted to the Connecticut

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[8] The term "fraud" (or "fraudulent") is also found in the following Connecticut Rules of Professional Conduct: Rule 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer); Rule 1.6 (Confidentiality of Information); and Rule 3.3 (Candor toward the Tribunal). GA at 78-83.

bar lack sufficient notice as to what the proscription against fraud in Rule 8.4(3) means.

In addition, although the words "dishonesty," "deceit," and "misrepresentation" in Rule 8.4(3) are not defined in Rule 1.0, there is also sufficient guidance for attorneys admitted to the Connecticut bar to be on notice as to what these terms mean. Connecticut courts do not appear to have defined the common term "dishonesty," but "dishonest" as an adjective is included in statutory definitions of improper behavior promulgated by the State's legislature. *See, e.g.,* Conn. Gen. Stat. §2-69(a) ("dishonest conduct" defined in context of transgressions involving client security funds). "Deceit" is construed as essentially synonymous with fraud. *Nelson v. Charlesworth,* 846 A.2d 923, 925 (Conn. App. 2004). And a "misrepresentation" is "merely '[a]n untrue statement of fact.'" *Ansell v. Statewide Grievance Comm.,* 865 A.2d 1215, 1222 n.2 (Conn. App. 2005)(quoting Black's Law Dictionary (6th ed. 1990)). These three terms are "not peculiar' or "startlingly innovative," *see Howell,* 843 F.2d at 206, and they are familiar, or should be familiar, to all attorneys admitted to the Connecticut bar and engaged in the practice of law in this state.

In addition, as noted above, Connecticut's appellate courts have not struggled in affirming lower court findings that Rule 8.4(3) has been violated by counsel admitted to the Connecticut bar. *See, e.g., Haymond,* 723 A.2d at 809 (affirming petitioner's Rule 8.4(3) reprimand for false and misleading professional advertising); *Ansell,* 865 A.2d at 1223 (attorney who engaged in misrepresentations violated

Rule 8.4(3)); *Statewide Grievance Comm. v. Egbarin,* 767 A.2d 732, 741 (Conn. App. 2001) (upholding five-year bar suspension for Rule 8.4(3) violations because attorney had engaged in misrepresentations and non-disclosures).

The plaintiff has not identified any cases, federal or state, where courts have held that Rule 8.4(3) or its identical counterparts are unconstitutional. There are, however, at least two state appellate court rulings upholding the constitutionality of counterparts to Rule 8.4(3).

In *Rogers v. Mississippi Bar,* 731 So. 2d 1158, 1164 (Miss. 1999), the Mississippi Supreme Court, citing both *Howell* and *Snyder* with approval, held that the state's rule of professional conduct prohibiting dishonesty, fraud, deceit, or misrepresentation by an attorney was constitutional. According to the court, the rule is "sufficiently clear as to [its] meaning and application so as to instruct those of ordinary intelligence, *within the profession,* on how to pattern their actions in accordance with the rules . . . ." *Id.* (emphasis added). To drive its point home, the *Rogers* court also noted that Rule 8.4(c) is one of the "'bread and butter' charge[s] in attorney discipline cases." *Id.* (quoting *Mathes v. Mississippi Bar,* 637 So. 2d 840, 848 (Miss. 1994)).

In addition, in the bar disciplinary action of *The Florida Bar v. Ross,* 732 So. 2d 1037 (Fla. 1999), the attorney argued that "dishonesty" in the state rule of professional responsibility was not defined and that the "common meaning" of the word did not "convey a

sufficiently definite warning of the conduct to which it applies." *Id.* at 1042. The Florida Supreme Court gave the argument short shrift: "We reject [the] argument that rule 4-8.4(c) is unconstitutionally vague and find that a person of common intelligence could be expected to understand the conduct proscribed by the rule." *Id.* "Common intelligence" also underlies understanding of the nature of an attorney's conduct that is prohibited by Rule 8.4(3), and the rule is clearly not constitutionally defective on its face.

3. The plaintiff's arguments

The plaintiff relies heavily on a treatise, *The Law of Lawyering,* by Geoffrey Hazard and W. William Hodes (Hazard & Hodes), to support his arguments that Rules 8.4(3) and 8.4(4) are facially unconstitutional. These authors highlight problems they perceive with the scope of rules of professional conduct that are identical counterparts of Rules 8.3(3) and 8.4(4). It is telling, however, that they express no opinion about the facial constitutionality of those identical counterparts and do not identify even a single case in which these rules or their identical counterparts have been found to be unconstitutional, either facially or as applied.

Indeed, the treatise authors appear simply to be advocating for evolution and refinement of the rules. For example, as to Rule 8.4(c), the authors opine that this rule "requires further construction and application before its overall place in the law of lawyering can be assessed." GA at 149; *see also* Appellant's Appendix at 1. As to Rule 8.4(d), the authors note,

> The debate leading to adoption of Rule 8.4(d) by the ABA House of Delegates made clear that it was intended to address violations of well-understood norms and conventions of practice only. That legislative history, if accepted by the courts and disciplinary authorities, should provide sufficient notice to lawyers as to what is required of them.

GA at 154. While Hazard & Hodes is a respected treatise, it does not provide a sufficient basis for a finding that Rules 8.4(3) and 8.4(4) are unconstitutional on their face.

The plaintiff also contends that "the commentary to rule 8.4 claims that [the] *language of rule 8.4(3) is 'broad and ambiguous,*'" and asks, "How can a rule which is claimed by its own commentary to be 'broad and ambiguous' not be unconstitutionally so?" Appellant's Brief at 8 (emphasis in original). The plaintiff fails to make clear, however, that the "broad and ambiguous" language he relies on is not found in the "Official Commentary" to Rule 8.4, *see* GA at 84, but is instead part of the opinion of the attorney authors of the annotated commentary for Rule 8.4(3). GA at 155-60. This commentary is hardly the admission of unconstitutionality that the plaintiff asserts. In fact, like the authors of the Hazard & Hodes treatise, the authors of the annotated commentary offer no opinion that Rules 8.4(3) and 8.4(4) are facially infirm pursuant to United States Supreme Court overbreadth and void-for-vagueness analysis.

Indeed, contrary to the plaintiff's assertions, the Official Commentary to Rule 8.4 does contain guidance as

to how the professional misconduct violations it contains should be construed.[9] For example, "[m]any kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return." GA at 84. Moreover, there are limits as to what a lawyer admitted to the Connecticut bar should be "professionally answerable" for:

> Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

GA at 84.

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[9] In the "Scope" section of the Connecticut Rules of Professional Conduct, the Judges of the Connecticut Superior Court explain the role of "the Commentary accompanying each Rule." The Commentary "explains and illustrates the meaning and purpose of the Rule. . . . The Commentaries are intended as guides to interpretation, but the text of each Rule is authoritative. Commentaries do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules." GA at 76.

In the absence of case law that is either precedential or persuasive, the plaintiff fails to meet his burden of showing that either of the challenged rules "reaches a substantial amount of constitutionally protected conduct" or "is impermissibly vague in all of its applications." *Hoffman,* 455 U.S. at 494-95. He completely ignores the Supreme Court's requirement that statutes, and other proscriptions such as rules of professional conduct applicable to lawyers, must be evaluated for purposes of First Amendment overbreadth "not only in an absolute sense, but also relative to the statute's plainly legitimate sweep." *Williams,* 553 U.S. at 292-93. Not only does the plaintiff fail to discuss the Supreme Court's *Snyder* decision on the unique nature of rules of professional conduct directed at lawyers, or the oft-cited *Howell* decision from the Court of Appeals for the Fifth Circuit, he does not even cite them in his brief. *Snyder* recognizes the privileged and sometimes difficult nature of bar membership, including adherence to rules of professional conduct that may limit some speech and conduct because of "the burdens inherent in the attorney's dual obligations to clients and to the system of justice."[10] 472 U.S. at 644.

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[10] Courts have continued to cite *Snyder* as authority for the proposition that rules of professional conduct "*must* be read in light of the 'complex code of behavior' to which attorneys are subject." 472 U.S. at 644 (citation omitted)(emphasis added). For example, in *In re Comfort,* 159 P.3d 1011 (Kan. 2007), the court cited *Snyder* in support of its conclusion that "both the United States Supreme Court and this court have previously recognized that the freedom of speech is not inevitably without limitation. Lawyers, *in particular,* trade certain aspects of their (continued...)

Moreover, these cases and others make clear that professional conduct rules such as 8.4(3) and 8.4(4) apply only to individuals with specialized training in the law "who are professionals and have the benefit of guidance provided by case law, court rules and the 'lore of the profession.'" *Howell,* 843 F.2d at 208. The plaintiff has failed to address the unique nature of attorney professional conduct rules and their "plainly legitimate sweep" in First Amendment overbreadth analysis.

When Rules 8.4(3) and 8.4(4) are construed in the light of applicable First Amendment standards, and in the light of standards set forth by the Supreme Court in *Snyder* as to the roles and obligations of bar members in the system of justice, the two rules of professional conduct challenged on their face in this suit pass constitutional muster.

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[10] (...continued)
free speech rights for their licenses to practice." *Id.* at 1025 (emphasis added).

Conclusion

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated: July 28, 2011

Respectfully submitted,

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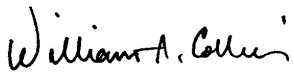

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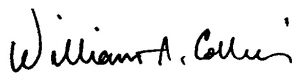
This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 8,537 words, exclusive of the Table of Contents, Table of Authorities and Addendum of Statutes and Rules.



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ADDENDUM

Connecticut Rules of Professional Conduct

Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:
...

(3) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation; [or]

(4) Engage in conduct that is prejudicial to the administration of justice.