DiPENTIMA, J., concurring in part and dissenting in part. I respectfully dissent from the judgment reached by my colleagues. I agree with the thorough, thoughtful analysis and conclusions of the majority that the plaintiff in error, John F. O'Brien (plaintiff), violated rules 3.1 and 3.3 of the Rules of Professional Conduct. I further join in the majority's opinion that the trial court improperly found a violation of rule 1.2 of the Rules of Professional Conduct. I disagree, however, that the court improperly found a violation of rule 8.4 of the Rules of Professional Conduct. Accordingly, I respectfully dissent.

As a preliminary matter, I note my agreement with the comprehensive recitation of the factual and procedural history set forth in the majority opinion.[1] On the basis of my review of this history, several key points emerge. First, the plaintiff failed to appreciate the significance of requesting an inquiry pursuant to General Statutes § 54-47c.[2] Although he acknowledged that he was proceeding under the section concerning crimes of corruption involving a member of the state government,[3] the plaintiff stated that he was not accusing the state's attorney of any misconduct. Nevertheless, the effect of requesting the investigatory procedure set forth in § 54-47c was to accuse a state actor of participating in a criminal act.[4] Furthermore, by the use of § 54-47c, as well as citation to the Rules of Professional Conduct, coupled with his assorted complaints regarding the conduct of the state's attorney's office,[5] the plaintiff clearly, if not explicitly, implied that a member of the state's attorney's office had tampered with the evidence. The logical corollary to this accusation is that the state actively attempted to obtain a fraudulent conviction. In other words, the plaintiff, whether intentionally or not, alleged very serious charges of misconduct against the office of the state's attorney.

Second, the plaintiff never was able to provide the court with an evidentiary basis to support the claim that an agent of the government had committed a crime.[6] I acknowledge that a comparison of the state's exhibit eleven and T's exhibit F reveal that the document had been altered. Moreover, the belief that a violation of General Statutes § 53a-155, which proscribes tampering with evidence, had occurred certainly was plausible. It does not follow, however, that a government agent was responsible for such tampering with evidence, or knowingly allowed such evidence to be introduced during the criminal trial. Although a significant transgression occurred, namely, the alteration of an e-mail that later was admitted into evidence, there was no objective basis for the plaintiff to persist in linking or associating

this misconduct with the actions of a member of the state's attorney's office, or any state actor. Simply put, I am in full agreement with the statement of my colleagues that "[t]he plaintiff never presented a factual basis for a reasonable belief that a government entity had altered the e-mail."[7]

Third, there were inconsistencies between the plaintiff's words and actions. For example, on more than one occasion, the plaintiff expressed his belief in the professional integrity of the prosecutor, assistant state's attorney David L. Zagaja. Throughout the entire proceeding, however, the plaintiff lobbed accusations of wrongdoing that necessarily implicated both Zagaja and the office of the state's attorney. Additionally, the plaintiff seemed to acknowledge that if the state would provide an affidavit detailing the manner in which it received the document in question, the need for an investigation would be obviated.[8] Despite receiving such a sworn statement from Zagaja, the plaintiff did not withdraw the request for a § 54-47c investigation. Even after the court denied the plaintiff's request and found that he had violated the Rules of Professional Conduct, in his November 6, 2003 reply, he continued suggesting misconduct on the part of the state's attorney's office.[9] Finally, although the plaintiff had acknowledged that other methods of investigation could have been used, he advanced the procedure set forth in § 54-47c.

The court's finding that the plaintiff violated rule 8.4 was premised on the fact that his baseless claims called into question the integrity of the state's attorney's office. The court then observed: "Frankly, what caused me more concern—and I can understand how sometimes you might get carried away during a trial. *But what caused me more concern in reading your reply that was filed appreciably after the incident when the dust has settled—I think in November, from July to November—and still—this is what disturbed me. And I know what disturbed me was the your persistence in these claims when the law was clearly not on your side.*"[10] (Emphasis added.)

Finally, I share in the concerns set forth by my colleagues regarding the introduction of an altered e-mail into evidence during a court proceeding.[11] However, the choice of redress and the manner employed by the plaintiff, by the express language used in § 54-47c, contained an allegation of criminal wrongdoing by a state actor, most likely a member of state's attorney's office. Most importantly, the plaintiff's pursuit never yielded, even when it was clear that there was no evidence implicating an agent of the government. The choice of conduct continued despite the opportunity to pursue other options to discover the source of the alteration.

With these points in mind, I turn my attention to whether the plaintiff's conduct constituted a violation

of rule 8.4. "[R]ule 8.4 (4) of the Rules of Professional Conduct . . . prohibits an attorney from engaging in conduct that is prejudicial to the administration of justice . . . . It is well established that members of the bar [must] conduct themselves in a manner compatible with the role of courts in the administration of justice." (Internal quotation marks omitted.) *Notopoulos* v. *Statewide Grievance Committee*, 277 Conn. 218, 235, 890 A.2d 509, cert. denied, U.S. , 127 S. Ct. 157, 166 L. Ed. 2d 39 (2006). "Rule [8.4 (4)] overlaps with a large number of the rules in Part 3 of the Rules of Professional Conduct, for almost all of the limits upon advocacy specified in those Rules are designed to protect the integrity of the justice system." 2 G. Hazard & W. Hodes, The Law of Lawyering (3d Ed. 2008 Sup.) § 65.6, p. 65-11. In other words, rule 8.4 is a "catch-all" provision stating general grounds for discipline. See 1 Restatement (Third), Law Governing Lawyers § 5, p. 50 (2000).

I further note that this court has rejected the argument that a violation of rule 8.4 (4) requires the element of intent. In *Daniels* v. *Statewide Grievance Committee*, 72 Conn. App. 203, 210–11, 804 A.2d 1027 (2002), we stated: "Judges no less than lawyers are chargeable for deviations from the codes governing their conduct, even though the application of the canons to particular circumstances may not be readily apparent. . . . *A judge may be sanctioned for a wilful violation of one of the canons of judicial conduct if he intended to engage in the conduct for which he is sanctioned whether or not* [*he*] *knows that he violates the rule.* . . . *That reasoning equally is applicable to lawyers and, therefore, we conclude that the court properly held that rule 8.4 (4) does not have a scienter requirement.* . . . Trial courts that have considered claims of violations of other ethical rules have held that those rules also contain no scienter requirement. See, e.g. . . . . *Gersten* v. *Statewide Grievance Committee*, judicial district of Hartford-New Britain at Hartford, Docket No. CV-96-0565949 (June 10, 1997) (19 Conn. L. Rptr. 554, 555) (construing Rules of Professional Conduct 1.8 [a] and determining that [i]t is not a defense to an ethical violation that the attorney did not act in bad faith or intend to violate the code) . . . . Although this court is not bound by trial court decisions . . . we agree with their reasoning on the subject and adopt it here." (Citations omitted; emphasis added; internal quotation marks omitted.) See also *Ansell* v. *Statewide Grievance Committee*, 87 Conn. App. 376, 388, 865 A.2d 1215 (2005) ("[f]urthermore, we have held that rule 8.4 (4) does not contain such a requirement [of intent]"). The focus, therefore, is not whether the plaintiff's subjective motivation[12] for calling for a § 54-47c investigation was improper or done in bad faith, but whether his conduct in persisting with such claims without an underlying evidentiary basis violated rule 8.4 (4).

A cursory review of the cases in which a violation of rule 8.4 (4) has been found is appropriate. In *Notopoulos* v. *Statewide Grievance Committee*, supra, 277 Conn. 218, our Supreme Court determined that the statewide grievance committee properly found a violation when an attorney wrote a letter to a member of a probate judge's staff accusing the judge of extorting money for an alleged "crony." In *Daniels* v. *Statewide Grievance Committee*, supra, 72 Conn. App. 207, the attorney was reprimanded after he was found to have violated rule 8.4 (4) by failing to pay in a timely manner the judgment that had been rendered against him. In *Statewide Grievance Committee* v. *Whitney*, 227 Conn. 829, 830, 633 A.2d 296 (1993), the Superior Court ordered the one year suspension of an attorney who had refused on several occasions to attend a pretrial conference in a criminal matter.

As this case law demonstrates, rule 8.4 (4) casts a wide net over an assortment of attorney misconduct. In my view, the plaintiff's persistent and unfounded allegations of criminal behavior by state actors, as demonstrated by his conduct throughout the proceedings, falls within conduct prohibited by rule 8.4 (4). Like the trial court, I am less concerned with the plaintiff's initial use of § 54-47c than with his decision to persevere with this unfounded strategy. The plaintiff' continued to insinuate that members of the state's attorney's office and unnamed state actors had tampered with evidence, despite the lack of a nexus between such individuals and the actual alteration of the e-mail. Despite the plaintiff's contrary belief, mere possession of the e-mail does not equate to the source of the tampering. Accordingly, I believe that the trial court's finding of a violation of rule 8.4 (4) was proper. I would, therefore, deny the writ of error as to that issue.

As a final matter, I now turn to the issue of the propriety of the sanctions against the plaintiff. As I noted at the outset, I am in agreement with the majority that the court properly found violations of rules 3.1 and 3.3. I further agree that the court improperly found a violation of rule 1.2 and would grant the writ of error solely as to that claim. In my view, the monetary sanctions imposed by the court are readily divisible. Accordingly, I would set aside $100 of the fines imposed by the trial court. Finally, I agree with my colleagues that a remand with instructions for the trial court to determine whether the plaintiff should be required to attend a legal education class is proper.

I respectfully concur in part and dissent in part.

[1] The plaintiff represented a criminal defendant at trial. The defendant in the underlying criminal matter was acquitted. Her identity, therefore, is not disclosed in this opinion. We refer to the acquittee as T. See General Statutes § 54-142a (a).

[2] At the July 11, 2003 hearing, the court granted the plaintiff's request to make some preliminary remarks, at which time he admitted that T, for whom he had been trial counsel in a prior criminal matter, had several

alternative recourses to pursue with respect to the manner in which the state obtained the e-mail in question. "Her recourse is first and foremost, in her opinion and in my opinion, with this court, with Your Honor who presided over the trial of her case. She was not limited to presenting this motion to Your Honor. She has other avenues for different reasons, answers to these questions, including the statewide grievance committee, the office of the chief state's attorney . . . ." Thus, even at the outset, the plaintiff was aware that options other than the use of General Statutes § 54-47c could have been used.

[3] See General Statutes § 54-47b (2).

[4] The trial court aptly stated that "[w]e must be mindful that the request for an investigation pursuant to General Statutes § 53-47c limits our inquiry to the conduct of members of a governmental entity."

[5] I note that the plaintiff complained that the state's attorney's office improperly (1) failed to investigate the origin of the document, (2) failed to consider the attorney-client privilege, (3) used the document in an attempt to impeach the character of T, for whom he had been trial counsel in a prior criminal matter, and (4) failed to disclose the document prior to T's criminal trial.

[6] The court directly asked the plaintiff if he had a good faith basis to believe that the e-mail was tampered with or altered by anyone in the state's attorney's office, the police department or any other governmental entity or agent. The court later asked the plaintiff if he had a good faith basis that a government entity or agent altered the e-mail. After several attempts to avoid that direct question, the plaintiff responded in the affirmative. In my view, this query was not directed at ascertaining the plaintiff's motives or subjective belief regarding misconduct by a government actor, but whether the plaintiff had an objective basis to make such claims. In other words, the court was attempting to determine whether the plaintiff was in possession of evidence that would support his allegations other than his own subjective belief that a state actor was responsible for altering the e-mail.

[7] Furthermore, as noted by the majority, the court concluded that there were "no valid reasons" and "no empirical facts" that would afford the court "a reasonable belief that the assistant state's attorney [or] any other attorney or member of a governmental agency . . . had knowledge of, or participated in, the purported deletion of the subject five lines from state's exhibit [eleven]."

[8] At one point, the court asked the plaintiff what would happen if the state had received the e-mail in the exact condition that it was offered into evidence. The plaintiff responded: "That is the answer then, Your Honor. That's the answer. *Then, let the state provide an affidavit to Your Honor that we received it in such a fashion. . . . And then the whole matter—the whole matter is arguably finished*, except for the person who provided a tampered document to the state's attorney." (Emphasis added.)

[9] In response to the court's memorandum of decision, the plaintiff submitted a "reply to memorandum of decision and motion not to impose sanctions" on November 6, 2003, in which he continued with the allegations of wrongdoing by a state actor. He argued that the request for an investigation was filed in good faith on a reasonable belief and that he did not intend to "affront the court or the state's attorneys." Nevertheless, he maintained his belief that the document had been altered and "that this procurement by the state was suspect." He further insisted that the introduction of the document during the criminal trial "offended the laws and the principles of justice of this state as well as the constitutional rights of [T]," his client at that trial. The plaintiff implicitly challenged the veracity of Zagaja's affidavit when he stated: "Apart from the state's attorney's affidavit of July 15, 2003, there is no evidence of the origin of the document or how it came into [the former husband's] possession." He continued on this path by questioning the state's representation about the manner in which the state had received the document. The plaintiff indicated that the state's failure to disclose the document "raises reasonable doubts about the state's intentions." He suggested that the tactics employed by the state with respect to the document were unfair because they "intentionally precluded any timely challenge to the state's use of that document." The plaintiff also suggested that the state's attorneys were aware of the former husband's "intense hatred for [T]" and that should have alerted them to a motive and interest in seeing her convicted.

The plaintiff persisted in pursuing an investigation pursuant to General Statutes § 54-47c. "The issues surrounding state's [exhibit eleven] are inextricably linked to government actors who possessed and employed it. A deter-

mination of whether or not any state agent acted improperly, unethically or criminally in relation to [exhibit eleven] is what [T] sought. Neither [T] nor I accuse any particular person or governmental entity of wrongdoing; she only believes that wrongdoing occurred within the underlying proceedings . . . in connection with [exhibit eleven]."

[10] As I view the record, the court's finding of a violation of rule 8.4 (4) was premised on the plaintiff's conduct throughout the course of events and not his "initially questioning the role of the state's attorney . . . ."

[11] The record before us does not indicate whether the state's attorney's office investigated the circumstances of the altered e-mail in an effort to uncover the perpetrator. While it is somewhat understandable that the members of the state's attorney's office were upset with the accusations leveled by the plaintiff, I maintain a hope that an equal, if not greater concern, was that a fraudulent document was introduced, albeit unknowingly, into a court proceeding by a member of that office. I certainly expect that these prosecutors would be more concerned with the submission of false evidence than injury to their professional pride.

Nevertheless, the issue before us is whether there was clear and convincing evidence to support the court's finding of a violation of rule 8.4 (4). While I do not totally discount the context in which the plaintiff undertook his actions, I believe that we must consider the conduct of the plaintiff separate from the improper and illegal actions of the unidentified person who provided the state with the altered e-mail.

[12] I note that there is nothing in the record to suggest that the plaintiff acted with animus specifically towards Zagaja or more generally the office of the state's attorney.