CHIEF DISCIPLINARY COUNSEL *v.* ZBIGNIEW S. ROZBICKI (SC 19796)

Rogers, C. J., and Palmer, Eveleigh, McDonald, Robinson, D'Auria and Vertefeuille, Js.

Syllabus

The defendant, against whom a presentment action was filed by the plaintiff, Chief Disciplinary Counsel, appealed from the judgment of the trial court suspending him from the practice of law for four years. The court found, inter alia, that he had violated the Rules of Professional Conduct by accusing two Superior Court judges of bias, prejudice, and partiality during certain previous civil proceedings. On appeal, the defendant claimed that the trial court deprived him of his constitutional right to due process by admitting evidence regarding his prior disciplinary record, the allegations set forth in the presentment complaint were barred by the doctrines of res judicata and collateral estoppel, the plaintiff had failed to prove professional misconduct by clear and convincing evidence, and the trial court had abused its discretion by suspending him for a period of four years. *Held*:

1. The defendant could not prevail on his unpreserved claim that the trial court deprived him of his constitutional right to due process by allowing

the plaintiff to admit evidence of his prior professional misconduct without adequate notice; the defendant failed to demonstrate a due process violation that deprived him of a fair trial, as required under *State* v. *Golding* (213 Conn. 233), as the Statewide Grievance Committee's express consideration of his disciplinary record in directing the plaintiff to file a presentment action provided ample notice that evidence regarding his prior professional misconduct could be raised during the presentment proceeding.

2. The defendant could not prevail on his claim that the doctrines of res judicata and collateral estoppel barred the allegations of professional misconduct set forth in the presentment complaint; this court concluded that, because the judges presiding over the previous proceedings declined to exercise jurisdiction, the question of whether the defendant's actions violated the Rules of Professional Conduct had not been litigated, and, therefore, the allegations set forth in the presentment complaint were not barred.

3. The trial court's findings that the defendant had violated the Rules of Professional Conduct were supported by clear and convincing evidence; the trial court's findings and conclusions were supported by ample evidence in the record demonstrating that the defendant had made countless motions and arguments impugning the judges for no apparent reason beyond the fact that the judges had ruled in opposition to him.

4. The trial court did not abuse its discretion by ordering that the defendant be suspended from the practice of law for a period of four years; the trial court had properly considered various aggravating and mitigating factors in determining the appropriate sanction for the defendant's professional misconduct and, therefore, had acted within the broad discretion afforded to the Superior Court in the context of attorney grievance proceedings.

Argued May 2—officially released September 5, 2017

Procedural History

Presentment by the plaintiff for alleged professional misconduct by the defendant, brought to the Superior Court in the judicial district of Litchfield and transferred to the judicial district of Hartford, where the court, *Robaina*, *J.*, denied the defendant's motion to dismiss; thereafter the matter was tried to the court, *Robaina*, *J.*; judgment suspending the defendant from the practice of law for four years, from which the defendant appealed. *Affirmed*.

Zbigniew S. Rozbicki, self-represented, the appellant (defendant).

Leanne M. Larson, assistant chief disciplinary counsel, for the appellee (plaintiff).

Opinion

ROBINSON, J. The defendant, Zbigniew S. Rozbicki, an Attorney, appeals[1] from the judgment of the trial court, rendered following presentment by the plaintiff, Chief Disciplinary Counsel, concluding that he had violated rules 3.1, 8.2 (a), and 8.4 (4) of the Rules of Professional Conduct[2] and suspending him from the practice of law for a period of four years. In challenging the trial court's judgment, the defendant raises a multitude of claims, including the following: (1) that the trial court violated his constitutional right to due process; (2) that the allegations in the presentment were barred under the doctrines of res judicata and collateral estoppel; (3) that the plaintiff failed to prove professional misconduct by clear and convincing evidence; and (4) that the trial court abused its discretion in imposing a four year suspension without considering certain factors set forth in the American Bar Association's Standards for Imposing Lawyer Sanctions (standards). We disagree and, accordingly, affirm the judgment of the trial court.

The record reveals the following relevant facts and procedural history. The grievance arises from the defen-

[1] The defendant appealed from the judgment of the trial court to the Appellate Court, and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

[2] Rule 3.1 of the Rules of Professional Conduct provides in relevant part: "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. . . ."

Rule 8.2 (a) of the Rules of Professional Conduct provides in relevant part: "A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge . . . ."

Rule 8.4 of the Rules of Professional Conduct provides in relevant part: "It is professional misconduct for a lawyer to . . . (4) [e]ngage in conduct that is prejudicial to the administration of justice . . . ."

dant's accusations of judicial bias, prejudice, and partiality against two judges of the Superior Court, namely, Judge Vincent E. Roche and Judge John A. Danaher. The accusations were made in various motions, memoranda, and oral argument submitted and presented by the defendant throughout extensive litigation relating to his position as an executor of the estate of Kathleen Gisselbrecht (decedent).[3] The defendant filed several actions against members of the decedent's family, two of which are most relevant to the present appeal.

In the first case, the defendant appealed from a decision of the Probate Court regarding his final accounting as executor of the estate. See *Rozbicki* v. *Gisselbrecht*, Superior Court, judicial district of Litchfield, Docket No. CV-10-5007246-S (February 10, 2014). In that case, the defendant filed a motion to stay certain orders pending resolution of a separate but related matter. That motion was denied by Judge Roche. In response, the defendant filed a motion to disqualify Judge Roche, accusing him of failing "to adhere to basic principles of judicial impartiality . . . ." In an affidavit filed in support of that motion, the defendant averred that Judge Roche's ruling indicated "a transformation of a judge who has a duty to be impartial, to a judge who appears to be an advocate . . . ."[4] The defendant subsequently moved to disqualify Attorney J. Michael Sconyers, who represented certain members of the decedent's family. Judge Danaher denied that motion.

[3] The defendant initially was appointed executor of the estate of the decedent, who had been his friend. However, after the defendant filed a complaint against members of the decedent's family to recover certain life insurance proceeds, those family members hired Attorney J. Michael Sconyers to represent them in the handling of the estate and ultimately removed the defendant as executor of the decedent's estate. We note that a more detailed summary of facts regarding the defendant's involvement with this estate is set forth in *Chief Disciplinary Counsel* v. *Rozbicki*, 150 Conn. App. 472, 475–77, 91 A.3d 932, cert. denied, 314 Conn. 931, 102 A.3d 83 (2014).

[4] The record does not indicate the resolution of this motion.

In response, the defendant moved to disqualify Judge Danaher, claiming partiality, bias, and prejudice. Judge Danaher also denied that motion.

In the second case, the defendant alleged that the successor executor of the decedent's estate improperly denied a $20,000 claim in connection with a loan that the defendant had allegedly made to the decedent. See *Rozbicki* v. *Gisselbrecht*, Superior Court, judicial district of Litchfield, Docket No. CV-10-6001830-S (December 19, 2011). In that case, the defendant filed another motion to disqualify Attorney Sconyers, which Judge Danaher denied. The defendant thereafter made an oral motion to disqualify Judge Danaher, which was also denied. The defendant subsequently filed a written motion to disqualify Judge Danaher, claiming "bias, prejudice, and partiality . . . ." Judge Danaher later denied this motion in a detailed memorandum of decision.

On December 19, 2011, Judge Roche granted the executor's motion for summary judgment regarding the defendant's claims for fees and payment of the $20,000 loan. See *Rozbicki* v. *Gisselbrecht*, supra, Superior Court, Docket No. CV-10-6001830-S. The defendant subsequently moved to reargue a previous decision by Judge Danaher denying, inter alia, a motion for an order of compliance in connection with a dispute regarding a deposition. In his motion to reargue, the defendant claimed that Judge Danaher's decision (1) was "ridden with indications of a bias and prejudice . . . so blatant and beyond the parameters of judicial authority and responsibility that the decision cannot legally or ethically be sanctioned," (2) demonstrated "abuse of judicial power to prejudge matters and cases not before the court and raises substantial issues of impropriety and partiality," (3) "manifested a bias and prejudice to the [defendant] and harassment [that] violated [his] constitutional right of access to the courts and [to] a

fair trial," (4) brought the "judiciary into disrepute," and (5) indicated an intent "to affect and impair the outcome of other pending cases . . . ."

The defendant then filed an objection to a motion for an order regarding certain deposition costs filed by opposing counsel. In that objection, the defendant accused Judge Danaher of bias, prejudice, judicial impropriety, abuse of judicial authority, and judicial misconduct. The defendant subsequently moved to reargue Judge Roche's decision granting summary judgment. In that motion to reargue, the defendant again accused Judge Danaher of acting extrajudicially and in a biased manner. Thereafter, the defendant filed a motion to "vacate [an] extrajudicial order," accusing Judge Danaher of becoming an advocate for the opposing party, evoking profound bias and prejudice, failing to uphold and apply the law, failing to be fair and impartial, and taking a personal interest in the proceedings.

In response to these serious and repetitive accusations against Judges Roche and Danaher, Attorney Sconyers filed a grievance against the defendant with the Statewide Grievance Committee on January 11, 2012. After a hearing, the Litchfield Judicial District Grievance Panel determined that there was probable cause to believe that the defendant had violated the Rules of Professional Conduct. The matter was presented to the Statewide Grievance Committee at a hearing on February 5, 2013, during which the defendant, represented by counsel, testified. Thirty-seven exhibits were admitted during that proceeding, and both the defendant and the plaintiff filed a posthearing brief.

On July 26, 2013, the Statewide Grievance Committee found, by clear and convincing evidence, that the defendant's "improper, baseless accusations" against Judges Roche and Danaher violated rules 3.1, 8.2 (a), and 8.4 (4) of the Rules of Professional Conduct. The Statewide Grievance Committee directed the plaintiff to file a

presentment against the defendant including the violations of those rules, and to seek the imposition of any sanction the court deemed appropriate.

In the presentment complaint, the plaintiff accused the defendant of violating rules 3.1, 8.2 (a), and 8.4 (4) of the Rules of Professional Conduct by making "baseless accusations" against Judges Roche and Danaher. The plaintiff cited the defendant's history of professional discipline, including his presentment in two cases in 1987, which resulted in a three month suspension from the practice of law in 1992, a reprimand in 2006, and his presentment in two cases in 2011, which resulted in a two year suspension from the practice of law.

Presentment proceedings were held before the trial court.[5] In a memorandum of decision dated June 16, 2015, the trial court found, by clear and convincing evidence, that the defendant had violated rules 3.1, 8.2 (a), and 8.4 (4) of the Rules of Professional Conduct. The trial court relied on *Ansell* v. *Statewide Grievance Committee*, 87 Conn. App. 376, 384, 865 A.2d 1215 (2005), in rejecting the defendant's defenses of collateral estoppel and res judicata, which were based on the argument that, because the conduct underlying the presentment allegations occurred in the presence of Judges Roche and Danaher, and those courts declined to take further action, despite the authority to do so, the defendant was absolved of any unethical conduct. Similarly, the trial court relied on *Chief Disciplinary Counsel* v. *Rozbicki*, 150 Conn. App. 472, 91 A.3d 932, cert. denied, 314 Conn. 931, 102 A.3d 83 (2014), in rejecting the defendant's argument that the plaintiff lacked standing to bring the presentment.

Specifically, the trial court found, by clear and convincing evidence, that the defendant's accusations

[5] For the sake of clarity, we note that all references to the trial court hereinafter are to Judge Robaina unless otherwise specified.

against Judges Roche and Danaher lacked good faith and, thus, violated rule 3.1 of the Rules of Professional Conduct. Likewise, the trial court found, by clear and convincing evidence, that the defendant lacked "a good faith basis" for making statements in support of his various motions for disqualification and other pleadings that attacked the integrity of the court and had, therefore, violated rule 8.2 of the Rules of Professional Conduct. Finally, the trial court found, by clear and convincing evidence, that the defendant had violated rule 8.4 (4) of the Rules of Professional Conduct on the basis of his "relentless and repetitive attack on the integrity of the court . . . [which] appear[ed] to be personal." Having determined that the defendant had violated the Rules of Professional Conduct, the trial court turned to the standards promulgated by the American Bar Association to determine the appropriate sanction. After considering these standards, the trial court suspended the defendant from the practice of law for four years. This appeal followed. See footnote 1 of this opinion.

On appeal, the defendant has asserted, inter alia, the following four claims: (1) that the trial court violated his right to due process by allowing the plaintiff to admit extrinsic and irrelevant evidence regarding his previous disciplinary record; (2) that the allegations against him were barred under the doctrines of res judicata and collateral estoppel because Judges Roche and Danaher failed to act pursuant to rule 2.15 of the Code of Judicial Conduct;[6] (3) that the plaintiff failed

[6] Rule 2.15 of the Code of Judicial Conduct provides in relevant part: "(b) A judge having knowledge that a lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question regarding the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects shall take appropriate action including informing the appropriate authority. . . .

"(d) A judge who receives information indicating a substantial likelihood that a lawyer has committed a violation of the Rules of Professional Conduct shall take appropriate action. . . ."

to establish, by clear and convincing evidence, that he violated the Rules of Professional Conduct; and (4) that the trial court abused its discretion by suspending him from the practice of law for four years.[7] We address each of these claims in turn. Additional relevant facts and procedural history will be set forth as necessary.

I

The defendant first claims that the trial court deprived him of his right to due process[8] by allowing the plaintiff to admit extrinsic and irrelevant evidence on issues beyond those presented to the Statewide Grievance Committee. Specifically, the defendant contends that the presentment complaint did not provide

[7] The defendant also contends, without providing us the benefit of adequate briefing, that the trial court lacked subject matter jurisdiction insofar as the plaintiff lacked standing to bring a presentment complaint because the reviewing committee did not first submit its proposed decision to the Statewide Grievance Committee for final approval and, as such, no final judgment was issued. "We cannot dispose of this issue via inadequate briefing rules . . . because the issue of standing implicates subject matter jurisdiction, and may be raised at any time, including by the court sua sponte." (Citation omitted.) *Horner* v. *Bagnell*, 324 Conn. 695, 705 n.11, 154 A.3d 975 (2017).

In reviewing this claim, we note that the defendant previously and unsuccessfully raised this exact issue in *Chief Disciplinary Counsel* v. *Rozbicki*, supra, 150 Conn. App. 479–81. There, the Appellate Court determined that the defendant's claim was based on an interpretation of the applicable statutes in a vacuum, without regard to certain amendments to our rules of practice. Id., 480. Although we are not bound by decisions of the Appellate Court, we are persuaded by its analysis on this issue. See *Commission on Human Rights & Opportunities ex rel. Arnold* v. *Forvil*, 302 Conn. 263, 271, 25 A.3d 632 (2011). Thus, the jurisdictional claim is controlled by the Appellate Court's reasoning, the correctness of which the defendant does not challenge. Accordingly, we conclude that the defendant's jurisdictional claim is without merit.

[8] It is not clear from the defendant's briefing whether his due process claim is predicated on the state or federal constitution. However, because he "has not provided an independent analysis of this issue under *State* v. *Geisler*, 222 Conn. 672, 684–86, 610 A.2d 1225 (1992), we deem abandoned any state constitutional due process claim. . . . Accordingly, we analyze the defendant's due process claim under the federal constitution only." (Citation omitted.) *State* v. *Skok*, 318 Conn. 699, 702 n.3, 122 A.3d 608 (2015).

adequate notice of the specific factual charges against him, namely, his prior professional misconduct. In response, the plaintiff contends that a presentment proceeding is a trial de novo, and, as such, the trial court is not bound by the findings of the Statewide Grievance Committee. Additionally, the plaintiff argues that, because presentment proceedings are not a criminal or civil trial, the complaint need not be as precise as one expected in criminal or civil complaints, and that, therefore, the trial court has greater discretion to consider any evidence received at the presentment proceeding in order to determine an appropriate sanction. For the reasons which follow, we conclude that the defendant is unable to prevail on his due process claim.

"It is well settled that [o]ur case law and rules of practice generally limit [an appellate] court's review to issues that are distinctly raised at trial. . . . [O]nly in [the] most exceptional circumstances can and will this court consider a claim, constitutional or otherwise, that has not been raised and decided in the trial court. . . . The reason for the rule is obvious: to permit a party to raise a claim on appeal that has not been raised at trial—after it is too late for the trial court or the opposing party to address the claim—would encourage trial by ambuscade, which is unfair to both the trial court and the opposing party." (Citations omitted; internal quotation marks omitted.) *Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.*, 311 Conn. 123, 142, 84 A.3d 840 (2014). However, it also is well settled that a defendant may prevail on an unpreserved claim when: "(1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional

violation beyond a reasonable doubt." (Footnote omitted.) *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989); see *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015) (modifying third prong of *Golding*).

In reviewing the defendant's due process claim under *Golding*,[9] we begin by noting that his brief specifically argues the following: "[The plaintiff] devoted thirty-one paragraphs [of the presentment complaint] to a history of allegations relating to a previous grievance. None of the thirty-one paragraphs [was] part of the Statewide Grievance Committee's findings, the local panel's findings, or the reasons for [Attorney] Sconyers' grievance." The defendant then notes that, notwithstanding his objection, the trial court allowed evidence supporting the allegations in the complaint to be presented. The defendant then claims the following: "[The plaintiff] specifically narrowed the issues in the presentment, on the record, when the [defendant] raised his objection to [the plaintiff's] attempt to admit extrinsic, irrelevant and prejudicial evidence during the proceedings. The issues were narrowed to the same issues directed by

[9] The trial court's memorandum of decision did not address or decide the defendant's due process claim regarding his lack of proper notice of the charges against him. The defendant also did not raise this claim in his memorandum of law in support of his motion for reargument. As such, we conclude that the defendant failed to adequately preserve this claim for appeal.

"[T]o obtain review of an unpreserved claim pursuant to [*Golding*], a defendant need only raise that claim in his main brief, wherein he must present a record that is [adequate] for review and affirmatively [demonstrate] that his claim is indeed a violation of a fundamental constitutional right." (Internal quotation marks omitted.) *State* v. *Elson*, 311 Conn. 726, 754–55, 91 A.3d 862 (2014). As such, a party's failure to request *Golding* review does not preclude consideration of his constitutional claim, if that claim otherwise was properly briefed, identified relevant constitutional authorities, and was founded on an adequate record for review. Id., 755.

The defendant failed to seek review of his unpreserved claim under *State* v. *Golding*, supra, 213 Conn. 239–40. Accordingly, we examine the defendant's brief to determine whether his claim nevertheless is reviewable under *Golding* pursuant to *State* v. *Elson*, supra, 311 Conn. 754–55.

the Statewide Grievance Committee to be included in the presentment." Finally, the defendant claims that "[t]he inclusion of the expanded broad factual allegations, beyond the narrow issues limited in the presentment, would not have provided the appellant with adequate notice of the specific factual charges, which the trial court considered for the first time in its decision."

In his brief discussion of this claim, it does not appear that the defendant identified or alluded to any way in which the trial court's consideration of evidence regarding his prior misconduct deprived him of a fair trial. The decision of the Statewide Grievance Committee expressly referenced the defendant's previous professional misconduct. Specifically, in concluding that the defendant's conduct warranted a presentment, that decision listed the following aggravating factors: "prior disciplinary history, a pattern of misconduct, multiple offenses and a refusal to acknowledge the wrongful nature of the conduct." In addition, the decision noted that "the [defendant] is currently serving a two year suspension as a result of a [prior] disciplinary order . . . ." Thus, the defendant was provided with ample notice that his previous misconduct could be raised at the presentment proceeding. Consequently, we conclude that the defendant has failed to demonstrate a due process violation that deprived him of a fair trial as required under the third prong of *Golding* and, therefore, cannot prevail on his unpreserved claim.

II

We next address the defendant's claim that, because his alleged misconduct occurred before two different judges who chose not to take action against him pursuant to rule 2.15 of the Code of Judicial Conduct; see footnote 6 of this opinion; he was absolved of any unethical conduct. As a result, the defendant contends that

the doctrines of res judicata[10] and collateral estoppel[11] precluded the trial court from considering his alleged misconduct in the present case. In response, the plaintiff contends that, when a violation of the Rules of Professional Conduct occurs before a judge of the Superior Court, an attorney is not automatically absolved of unethical conduct by that judge's subsequent inaction. The plaintiff further argues that a judge's decision not to refer an attorney to disciplinary authorities does not preclude subsequent institution of the disciplinary process. Finally, the plaintiff contends that the principles of res judicata and collateral estoppel do not apply to cases in which a judge has not referred a possible disciplinary issue to the Statewide Grievance Committee. We agree with the plaintiff and conclude that the doctrines of res judicata and collateral estoppel do not bar the allegations of professional misconduct in the present case.

[10] "Res judicata, or claim preclusion, express[es] no more than the fundamental principle that once a matter has been fully and fairly litigated, and finally decided, it comes to rest. . . . Generally, for res judicata to apply, four elements must be met: (1) the judgment must have been rendered on the merits by a court of competent jurisdiction; (2) the parties to the prior and subsequent actions must be the same or in privity; (3) there must have been an adequate opportunity to litigate the matter fully; and (4) the same underlying claim must be at issue. . . . Res judicata bars the relitigation of claims actually made in the prior action as well as any claims that might have been made there." (Citations omitted; internal quotation marks omitted.) *Wheeler* v. *Beachcroft, LLC*, 320 Conn. 146, 156–57, 129 A.3d 677 (2016).

[11] "The common-law doctrine of collateral estoppel, or issue preclusion, embodies a judicial policy in favor of judicial economy, the stability of former judgments and finality. . . . Collateral estoppel, or issue preclusion, is that aspect of res judicata which prohibits the relitigation of an issue when that issue was actually litigated and necessarily determined in a prior action between the same parties upon a different claim. . . . For an issue to be subject to collateral estoppel, it must have been fully and fairly litigated in the first action. It also must have been actually decided and the decision must have been necessary to the judgment." (Internal quotation marks omitted.) *Lighthouse Landings, Inc.* v. *Connecticut Light & Power Co.*, 300 Conn. 325, 343–44, 15 A.3d 601 (2011).

In reviewing this claim, we note that the Appellate Court previously considered this issue in *Ansell* v. *Statewide Grievance Committee*, supra, 87 Conn. App. 376. In that case, the attorney claimed that the failure of judges to reprimand her in response to certain in court conduct constituted clear and convincing evidence of a determination that no misconduct had occurred. Id., 383–84. In addressing this argument, the Appellate Court distinguished the Superior Court, which has "inherent authority to regulate attorney conduct," from grievance panels and reviewing committees, which are authorized "to investigate allegations of attorney misconduct and to make determinations of probable cause." (Internal quotation marks omitted.) Id., 384. Citing Practice Book § 2-45, the Appellate Court explained that "[w]hen the misconduct occurs in the actual presence of the court, the [Statewide Grievance Committee] shall defer . . . *if the court chooses to exercise its jurisdiction*." (Emphasis in original; internal quotation marks omitted.) Id. Accordingly, the Appellate Court concluded that "the courts chose not to exercise their disciplinary power, and the [Statewide Grievance Committee], exercising the power delegated to it, properly undertook to investigate and to evaluate the alleged misconduct." Id., 385. Although we are not bound by rulings of the Appellate Court, we are persuaded by its analysis of this issue. See *Commission on Human Rights & Opportunities ex rel. Arnold* v. *Forvil*, 302 Conn. 263, 271, 25 A.3d 632 (2011). Accordingly, we disagree with the defendant's claim that the silence of Judges Roche and Danaher in the wake of the defendant's actions must be interpreted in a manner that absolves the defendant of any professional misconduct. Thus, because no judicial authority has previously ruled on the question of whether the defendant's actions violated the Rules of Professional Conduct, the doctrines of res judicata and collateral estoppel do not

apply. Put another way, in concluding that the defendant's conduct violated the Rules of Professional Conduct, the trial court in the present case did not consider issues previously litigated and decided. Accordingly, we conclude that those doctrines do not bar the allegations of misconduct made against the defendant.

III

We next address the defendant's claim that the trial court improperly found that the plaintiff presented clear and convincing evidence of violations of rules 3.1, 8.2 (a), and 8.4 (4) of the Rules of Professional Conduct. The defendant contends that (1) his various motions and memoranda regarding Judges Roche and Danaher contained no abusive comments or accusations criticizing their abilities or competency, (2) Judge Danaher accused him of lying, which "created an atmosphere of discord" that called for disqualification, and (3) his allegations against Judges Roche and Danaher were made on a good faith belief of bias and prejudice. In response, the plaintiff argues that clear and convincing evidence of the defendant's professional misconduct was introduced through both documents and testimony. We agree with the plaintiff and conclude that the trial court's findings of misconduct are supported by clear and convincing evidence.

The standard of review of a trial court's judgment in the context of attorney grievance proceedings is well settled. "The trial court conducts the presentment hearing de novo. . . . In determining whether the evidence on the record supports the trial court's conclusion, our scope of review is of a limited nature. . . . All of our cases agree that the trial court has . . . wide discretion . . . . [A] reviewing court must defer to the discretion of the fact finder, whether it be the trial court or the committee, because the fact finder is in the best position to evaluate the evidence and the demeanor of the par-

ties. . . . [E]very reasonable presumption should be given in favor of the correctness of the court's ruling. . . . Judicial discretion is always a legal discretion. Its abuse will not be interfered with on appeal to this court except in a case of manifest abuse and where injustice appears to have been done." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Statewide Grievance Committee* v. *Egbarin*, 61 Conn. App. 445, 458–59, 767 A.2d 732, cert. denied, 255 Conn. 949, 769 A.2d 64 (2001).

In order to impose sanctions, the trial court must find that an attorney has violated the Rules of Professional Conduct by clear and convincing evidence. *Shelton* v. *Statewide Grievance Committee*, 277 Conn. 99, 109–10, 890 A.2d 104 (2006). "Clear and convincing proof is a demanding standard denot[ing] a degree of belief that lies between the belief that is required to find the truth or existence of the [fact in issue] in an ordinary civil action and the belief that is required to find guilt in a criminal prosecution. . . . [The burden] is sustained if evidence induces in the mind of the trier a reasonable belief that the facts asserted are highly probably true, that the probability that they are true or exist is substantially greater than the probability that they are false or do not exist." (Internal quotation marks omitted.) Id., 110. We review each of the trial court's findings of misconduct in turn.

Rule 3.1 of the Rules of Professional Conduct provides in relevant part: "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. . . ." The commentary to this rule clarifies what is considered to be a frivolous action, providing that an "action is frivolous . . . if the lawyer is unable either to make a good faith argument on the merits of

the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law. . . .'' Rules of Professional Conduct 3.1, commentary; see also, e.g., *Rozbicki* v. *Statewide Grievance Committee*, 111 Conn. App. 239, 240–41, 958 A.2d 812 (2008) (frivolously filing motion to disqualify opposing counsel by citing his sexual affair with client and describing couple's child as illegitimate violated rule 3.1), cert. denied, 290 Conn. 908, 964 A.2d 544 (2009); *Brunswick* v. *Statewide Grievance Committee*, 103 Conn. App. 601, 614–18, 931 A.2d 319 (alleging partiality of arbitrators without any support violated rule 3.1), cert. denied, 284 Conn. 929, 934 A.2d 244 (2007).

In the present case, as to rule 3.1 of the Rules of Professional Conduct, the trial court found that the defendant's actions amounted to frivolous, baseless accusations against Judges Roche and Danaher and that these assertions were not made in good faith. The trial court found that there was clear and convincing evidence demonstrating that the defendant ''repeatedly impugned the integrity'' of Judges Roche and Danaher and ''made a significant number of allegations as to judicial misconduct, judicial bias, judicial prejudice, and judicial self-interest.'' In examining these accusations, the trial court found that the defendant offered no good faith basis for them, and that his allegations were meritless and without support. The trial court noted that many of the defendant's pleadings were filed shortly after an adverse ruling or decision. Ultimately, the trial court concluded that ''[t]he sweeping, unfounded and oft repeated accusations alleging judicial misconduct, judicial bias, judicial prejudice, judicial harassment are found by clear and convincing evidence to be lacking in good faith and, as such, violated rule 3.1 . . . .''

Rule 8.2 (a) of the Rules of Professional Conduct provides in relevant part: "A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge . . . ." See also, e.g., *Notopoulos* v. *Statewide Grievance Committee*, 277 Conn. 218, 228–31, 890 A.2d 509 (accusing judge of extorting money, resorting to threats, and lining pockets with client's funds without factual support violated rule 8.2 [a]), cert. denied, 549 U.S. 823, 127 S. Ct. 157, 166 L. Ed. 2d 39 (2006); *Burton* v. *Mottolese*, 267 Conn. 1, 51–52, 835 A.2d 998 (2003) (conclusory and unsubstantiated allegations of trial court's gender bias violated rule 8.2 [a]), cert. denied, 541 U.S. 1073, 124 S. Ct. 2422, 158 L. Ed. 2d 983 (2004).

In the present case, as to rule 8.2 (a) of the Rules of Professional Conduct, the trial court found, by clear and convincing evidence, that the defendant's lack of a good faith basis for his statements impugning the integrity of Judges Roche and Danaher constituted misconduct. The trial court clarified that the basis for this violation "is not the fact that the motions [were] made or that they [were] repeated. Instead it is the unsupported, baseless allegations of judicial impropriety which make [the defendant's conduct] improper." See also, e.g., *Disciplinary Counsel* v. *Serafinowicz*, 160 Conn. App. 92, 95–97, 123 A.3d 1279 (attorney's disparaging remarks about judge to press accusing him of bias violated rule 8.2 [a]), cert. denied, 319 Conn. 953, 125 A.3d 531 (2015).

Finally, rule 8.4 of the Rules of Professional Conduct provides in relevant part: "It is professional misconduct for a lawyer to . . . (4) [e]ngage in conduct that is prejudicial to the administration of justice . . . ." The commentary to this rule provides that "[a] pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation." Rules of Professional Conduct 8.4,

commentary; see also, e.g., *Statewide Grievance Committee* v. *Burton*, 299 Conn. 405, 409–15, 10 A.3d 507 (2011) (submitting letters to Chief Justice accusing Superior Court judges of judicial corruption with no factual support violated rule 8.4 [4]); *Notopoulos* v. *Statewide Grievance Committee*, supra, 277 Conn. 236–37 (making disparaging, baseless remarks against judge violated rule 8.4 [4]); *Disciplinary Counsel* v. *Serafinowicz*, supra, 160 Conn. App. 92–97 (attorney's disparaging remarks to press accusing judge of bias violated rule 8.4 [4]).

In the present case, as to rule 8.4 (4) of the Rules of Professional Conduct, the trial court found, by clear and convincing evidence, that the defendant's relentless and repetitive attacks on the integrity of Judges Roche and Danaher constituted a violation of this rule. The trial court considered the findings made by the court in the defendant's prior disciplinary matter as part of a pattern of repeated offenses. Ultimately, the trial court found "that throughout each of the [actions] that were brought, the prosecutions, the appeals, [the] numerous frivolous and baseless repetitive motions for disqualification of both [opposing] counsel and [judges], the pattern of accusations of wrongdoing, of misconduct, of bias, of accusing others of harassing him, and of unethical conduct have prejudiced the administration of justice."

After reviewing the record in the present case, we conclude that ample evidence exists supporting the trial court's findings and conclusions. The record contains countless motions, memoranda, and arguments made by the defendant disparaging Judges Roche and Danaher for no apparent reason beyond the fact that those judges ruled in opposition to him. Not only did the defendant call into question the impartiality of Judges Roche and Danaher, but he also called into question their competency as judges and questioned the integrity

of the Judicial Branch. See, e.g., *Notopoulos* v. *Statewide Grievance Committee*, supra, 277 Conn. 236–37. We conclude that the trial court's factual findings and conclusions are supported by clear and convincing evidence and, therefore, we decline to disturb them on appeal.

IV

We next address the defendant's claim that the trial court abused its discretion by suspending him from the practice of law for four years. Specifically, the defendant contends that the plaintiff presented no evidence of his prior disciplinary history other than unsworn, erroneous claims. The defendant also claims that the plaintiff presented no evidence that his offenses were frequent. Finally, the defendant claims that the trial court ignored certain mitigating factors described in standards promulgated by the American Bar Association. In response, the plaintiff contends that the trial court properly considered the standards in determining the appropriate sanction for the defendant's misconduct. The plaintiff also contends that the defendant himself testified about his prior misconduct, which the trial court properly considered in determining the appropriate sanction. Finally, the plaintiff argues that the trial court acted well within the bounds of its discretion in suspending the defendant from the practice of law for four years. We agree with the plaintiff.

"The trial court possesses inherent judicial power, derived from judicial responsibility for the administration of justice, to exercise sound discretion to determine what sanction to impose in light of the entire record before it. . . . It is well established that in sanctioning an attorney for violations of the Rules of Professional Conduct, courts are, as they should be, left free to act as may in each case seem best in this matter of most important concern to them and to the administra-

tion of justice. . . . Whether this court would have imposed a different sanction is not relevant. Rather, we must determine whether the trial court abused its discretion in determining the nature of the sanction. . . . We may reverse the court's decision [in sanctioning an attorney] only if that decision was unreasonable, unconscionable or arbitrary, and was made without proper consideration of the facts and law pertaining to the matter submitted." (Citations omitted; internal quotation marks omitted.) *Statewide Grievance Committee* v. *Egbarin*, supra, 61 Conn. App. 459–60.

As this court has previously noted, the standards, which were promulgated by the American Bar Association, "provide that, after a finding of misconduct, a court should consider: (1) the nature of the duty violated; (2) the attorney's mental state; (3) the potential or actual injury stemming from the attorney's misconduct; and (4) the existence of aggravating or mitigating factors. . . . The [s]tandards list the following as aggravating factors: (a) prior disciplinary offenses; (b) dishonest or selfish motive; (c) a pattern of misconduct; (d) multiple offenses; (e) bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency; (f) submission of false evidence, false statements, or other deceptive practices during the disciplinary process; (g) refusal to acknowledge wrongful nature of conduct; (h) vulnerability of victim; (i) substantial experience in the practice of law; [and] (j) indifference to making restitution. . . . The [s]tandards list the following as mitigating factors: (a) absence of a prior disciplinary record; (b) absence of a dishonest or selfish motive; (c) personal or emotional problems; (d) timely good faith effort to make restitution or to rectify consequences of misconduct; (e) full and free disclosure to disciplinary board or cooperative attitude toward proceedings; (f) inexperience in the

practice of law; (g) character or reputation; (h) physical or mental disability or impairment; (i) delay in disciplinary proceedings; (j) interim rehabilitation; (k) imposition of other penalties or sanctions; (*l*) remorse; [and] (m) remoteness of prior offenses." (Internal quotation marks omitted.) *Burton* v. *Mottolese*, supra, 267 Conn. 55–56; see also American Bar Association, Standards for Imposing Lawyer Sanctions (1986) Standards 3.0, 9.22, and 9.32.

The memorandum of decision demonstrates that the trial court considered the various standards, including the relevant aggravating and mitigating factors, in arriving at its final determination of an appropriate sanction for the defendant's misconduct. In its decision, the trial court determined that the defendant's offenses were aggravated by the following factors: (1) the nature and repetition of the misconduct, as evidenced by the various motions, memoranda, and oral arguments included within the record; (2) the defendant's self-interested mental state; (3) the fact that the defendant's actions undermined the credibility of, and confidence in, the judiciary; (4) the defendant's lack of awareness regarding the nature of his offenses; and (5) the defendant's prior disciplinary history. The court then considered the length of the defendant's career as a mitigating factor. Given the great amount of discretion that we afford to trial courts in the context of attorney grievance proceedings, we conclude that the trial court did not abuse its discretion by ordering that the defendant be suspended from the practice of law for a period of four years.

We note that the defendant's brief raises numerous additional arguments in passing. After having examined these remaining claims carefully, we conclude that they are without merit.

The judgment is affirmed.

In this opinion the other justices concurred.

ANTHONY J. MAIO *v.* CITY OF NEW HAVEN (SC 19401)

Rogers, C. J., and Palmer, Eveleigh, McDonald and Robinson, Js.*

Syllabus

Pursuant to statute (§ 53-39a), a police officer may seek indemnification from his employing governmental unit for economic loss sustained in the defense of an unsuccessful prosecution of a crime allegedly committed by such officer in the course of his duty.

The plaintiff police officer, who was acquitted of certain crimes with which he was charged in connection with his conduct toward two complainants that allegedly occurred while he was working an extra duty shift at a local bar, brought an action against the defendant city pursuant to § 53-39a, seeking indemnification for the economic losses he incurred in connection with his criminal trial. At the indemnification trial, the defendant intended to have the complainants testify to rebut the plaintiff's contention that he was acting in the course of his duty, as required for a claim under § 53-39a, when, according to the complainants, he assaulted them. When the complainants failed to appear at trial, the defendant sought to offer the complainants' criminal trial testimony pursuant to the provision of the Connecticut Code of Evidence (§ 8-6 [1]) allowing the admission of an unavailable witness' prior testimony at a subsequent trial. The trial court excluded the prior testimony of both complainants, concluding that the complainants were not unavailable witnesses because, inter alia, the defendant had sufficient opportunity before trial to depose both complainants. Following a trial, the jury returned a verdict for the plaintiff, awarding him attorney's fees, accrued compensatory time and lost overtime. In a postverdict motion, the defendant claimed, inter alia, that the plaintiff was not acting in the course of his duty when he entered the bar during his shift in violation of a specific binding police department order regarding extra duty work and that the plaintiff had failed to prove that his supervising officers were aware of and tolerated a consistent pattern of violations of that order and, thus, had acquiesced in his presence inside the bar. The defendant also claimed that the trial court improperly excluded the complainants' prior criminal trial testimony. The trial court denied the motion and rendered judgment for the plaintiff, from which the defendant appealed. *Held*:

* This case was originally argued before a panel of this court consisting of Chief Justice Rogers and Justices Palmer, Zarella, Eveleigh, McDonald and Robinson. Thereafter, Justice Zarella retired from this court and did not participate in the consideration of this decision.

1. The defendant could not prevail on its unpreserved claim that the trial court improperly relied on workers' compensation principles in instructing the jury on the meaning of the phrase "in the course of his duty" under § 53-39a: this court addressed the defendant's claim because, even though the record revealed that the defendant failed to object to the use of workers' compensation principles at trial or in its postverdict motion for relief and drew on such principles in its requests to charge, the issue would necessarily recur on retrial, involved a question of law briefed by both parties, and the defendant could not prevail; moreover, this court concluded, after determining that the principles underlying both workers' compensation and indemnity statutes were similar, in that both types of statutes serve the remedial purpose of making an employee whole after suffering losses closely related to his or her employment and are in derogation of the common law and governmental immunity, and that the seminal cases construing § 53-39a simultaneously borrow definitions from workers' compensation and observe that § 53-39a is to be strictly construed, that it was not persuaded that workers' compensation principles were so incompatible with § 53-39a as to require overruling those seminal cases; furthermore, the legislature, having amended § 53-39a on multiple occasions without overruling this court's use of workers' compensation principles in interpreting the meaning of § 53-39a, had acquiesced in the court's use of that interpretive approach.
2. The trial court improperly declined to admit the former criminal trial testimony of the complainants when it failed to find that the complainants were unavailable to testify within the meaning of § 8-6 (1) of the Connecticut Code of Evidence and, because this court could not conclude that the trial court's error was harmless, the judgment was reversed and the case was remanded for a new trial: the trial court incorrectly required that the defendant attempt to depose the complainants as a precondition to the admission of their prior testimony, and this court, relying on the definition in the Federal Rules of Evidence of the term "unavailable," noted that a deposition requirement runs counter to the federal rules and was inapplicable to prior sworn testimony, as such a requirement would impose significant burdens on parties without any corresponding benefit to the reliability of the testimony to be admitted; furthermore, the trial court improperly declined to give weight to the representations of the defendant's counsel regarding his efforts in attempting to procure the complainants' presence at trial, a matter that counsel was competent to explain, and opposing counsel's objection to the use of such representations was based solely on the assertion that the court was not permitted to rely on such representations, rather than on any claim that the representations were inaccurate; moreover, in light of the interrelatedness of the trial court's errors, this court could not conclude that the exclusion of the complainants' testimony did not affect the jury's verdict, as such testimony was critical to the defendant's

claim that the plaintiff was not acting in the course of his duty as a police officer during the relevant time period, even if the plaintiff's employer acquiesced in the plaintiff's presence inside the bar.

Argued October 19, 2016—officially released September 5, 2017

Procedural History

Action for indemnification of economic losses incurred as a result of an unsuccessful criminal prosecution against the plaintiff in his capacity as a police officer employed by the defendant, and for other relief, brought to the Superior Court in the judicial district of New Haven and tried to the jury before *Wilson*, *J.*; verdict for the plaintiff; thereafter, the court denied the defendant's motion to set aside the verdict and for judgment notwithstanding the verdict and the plaintiff's motion for interest, and rendered judgment for the plaintiff in accordance with the verdict, from which the defendant appealed and the plaintiff cross appealed. *Reversed; new trial.*

Proloy K. Das, with whom were *Christopher M. Neary*, deputy corporation counsel, and, on the brief, *Erin E. Canalia*, *Craigin B. Howland* and *Sarah Gruber*, for the appellant-appellee (defendant).

Daniel Scholfield, with whom, on the brief, were *Donn A. Swift* and *Matthew D. Popilowski*, for the appellee-appellant (plaintiff).

Opinion

PALMER, J. Under General Statutes § 53-39a, a police officer acquitted of crimes "allegedly committed by such officer in the course of his duty" is entitled to indemnification from "his employing governmental unit for economic loss sustained by him as a result of such

prosecution . . . .”[1] The plaintiff, Anthony J. Maio, a police officer with the New Haven Police Department (department), sought such reimbursement from the defendant, the city of New Haven, after he was acquitted of charges of sexual assault in the fourth degree and unlawful restraint[2] for conduct involving two young women that allegedly occurred while he was working an “extra duty” shift at a local nightclub. When the defendant declined to reimburse the plaintiff in accordance with § 53-39a, the plaintiff brought this action for indemnification. Following a trial, the jury returned a verdict for the plaintiff, and the defendant appealed,[3] claiming that the trial court improperly (1) instructed the jury on the meaning of the phrase “in the course of [the officer's] duty” as that language is used in § 53-39a,[4] and (2) precluded the defendant's use of the testimony of two key state's witnesses at the plaintiff's criminal trial, namely, A and J, the complainants and alleged victims of the plaintiff's claimed misconduct (complainants). Although we disagree with the defendant's claim of instructional impropriety, we agree that the trial court improperly prohibited the defendant from using the complainants' prior testimony and, further, that that

[1] General Statutes § 53-39a provides in relevant part: “Whenever, in any prosecution of an officer of the Division of State Police . . . or a local police department for a crime allegedly committed by such officer in the course of his duty as such, the charge is dismissed or the officer found not guilty, such officer shall be indemnified by his employing governmental unit for economic loss sustained by him as a result of such prosecution, including the payment of attorney's fees and costs incurred during the prosecution and the enforcement of this section. . . .”

[2] The plaintiff was charged with two counts of sexual assault in the fourth degree in violation of General Statutes § 53a-73a (a) (2) and two counts of unlawful restraint in the second degree in violation of General Statutes § 53a-96.

[3] The defendant appealed from the judgment of the trial court to the Appellate Court, and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

[4] As we discuss more fully hereinafter, the defendant also contends that the trial court relied on an incorrect interpretation of the phrase in denying the defendant's motion for postverdict relief. This contention is in all material respects identical to the defendant's claim of instructional impropriety.

evidentiary error was not harmless. We conclude, therefore, that the defendant is entitled to a new trial.

The following facts and procedural history are relevant to our resolution of this appeal. On April 18, 2008, the plaintiff was scheduled to work an "extra duty" shift at Bar, a nightclub located on Crown Street in New Haven. In the early hours of April 19, 2008, as patrons were leaving Bar, the complainants approached Christopher Kelly, then a lieutenant in the department, in the street outside Bar and reported that they had been sexually assaulted by the plaintiff. The plaintiff subsequently was arrested on charges of sexual assault in the fourth degree and unlawful restraint in the second degree and placed on administrative leave. He eventually was acquitted of all charges, however, and, thereafter, he commenced this indemnification action against the defendant pursuant to § 53-39a.

The case proceeded to a jury trial, at which the plaintiff presented testimony from several officers for the purpose of demonstrating that he was acting "in the course of his duty" for purposes of § 53-39a while performing his "extra duty" shift at Bar. Specifically, the plaintiff sought to demonstrate that he was entitled to indemnification notwithstanding his admission that he was physically present inside Bar in violation of General Order 82-1, an order of the department that provides that an officer assigned to an extra duty shift at a bar or nightclub may not enter that establishment except in certain limited circumstances not applicable to the present case.[5] These officers, as well as the plaintiff,

[5] Dept. of Police Service, New Haven Police Dept., General Order 82-1 (effective January 25, 1982) provides in relevant part: "The purpose of this General Order is to restate the . . . [d]epartment policy regarding extra duty work at nightclubs and bars. . . .

"A police officer will not be assigned on an extra duty assignment at a *nightclub* or *bar* unless the following regulations promulgated under this directive are adhered to:

"1. The officer assigned to the extra duty shall work only in a recognized parking lot with the main responsibility being to protect vehicles from thefts,

testified that the department's rules proscribing the plaintiff's conduct were routinely violated without sanction and that high-ranking department officers were aware of such violations.[6] In addition, the plaintiff testified that his interactions with the complainants on the night in question were benign and professional.[7] The

acts of vandalism, and to prevent any disturbances that might take place in said parking lot . . .

"3. The officer assigned shall not enter the premises of the nightclub or bar itself, except in response to a criminal complaint or other emergency;

"4. When the officer is required to enter the nightclub or bar, the officer will immediately contact the radio dispatcher; inform the dispatcher of the action being taken, and request a complaint number;

"5. Whenever the officer has been required to enter a nightclub or bar, the officer shall prepare a case incident report and shall request that a radio car be dispatched to take the report to headquarters; and

"6. If the person requesting the hiring of a police officer for work at a nightclub or bar agrees to all the conditions set forth in this General Order, a letter will be directed to the Commander Officer of the Traffic and License Unit making such request and indicating the officer hired will only perform the duties listed above. . . ." (Emphasis in original.)

[6] As we explain more fully hereinafter, this court previously has held that the meaning of the phrase "in the course of his duty" under § 53-39a is guided by our construction of the phrase "course of employment" as that phrase is used in our workers' compensation statutes, General Statutes § 31-275 et seq. See, e.g., *Rawling* v. *New Haven*, 206 Conn. 100, 106, 537 A.2d 439 (1988). Whether an employee's conduct falls within the "course of [his] employment" for workers' compensation purposes is typically a fact-based determination that requires consideration of a variety of factors, including the "time, place and extent of [any] deviation [from the duties of his employment] . . . as well as what duties were required of the employee and the conditions surrounding the performance of his work . . . ." (Citation omitted; internal quotation marks omitted.) Id., 107.

[7] The plaintiff testified that, at closing time, he was approached by the complainants, who began to flirt with him in the vestibule of Bar, where he was stationed. After speaking to the complainants for a period of time, the plaintiff excused himself and went upstairs to the office to check in with the manager. While there, he heard what sounded like a bottle breaking, and when he stepped out of the office onto the landing to investigate, he heard "laughing and giggling" emanating from a private staff bathroom on the second floor and noticed that the weighted "European style" doors had not been properly closed. Upon pushing the door open, he saw the complainants. The plaintiff told them that they were not permitted to be there, but the complainants simply dismissed him, grabbing his notepad and writing, "Officer Maio, I [heart] you." One complainant tried to put her hand

defendant countered with testimony from ranking police officers who maintained that the plaintiff's presence inside Bar violated the department's orders and was not authorized, either explicitly or implicitly, by the plaintiff's superior officers. In addition, the defendant sought to introduce into evidence, under § 8-6 (1) of the Connecticut Code of Evidence,[8] the criminal trial testimony of the complainants concerning their encounter with the plaintiff. After finding that neither complainant was "unavailable" within the meaning of § 8-6, however, the trial court denied the defendant's request and barred the defendant's use of the complainants' prior testimony.

The jury returned a verdict in favor of the plaintiff, awarding $187,256.46 in attorney's fees, accrued compensatory time, and lost overtime. Thereafter, the defendant filed a motion seeking judgment notwithstanding the verdict or, in the alternative, a new trial. In that motion, the defendant conceded that "[t]he phrase, 'in the course of his duty,' is construed consistent with the meaning of 'course of employment' under workers' compensation law," and that an employer's acquiescence in the otherwise prohibited conduct of an employee is one consideration in determining whether an officer is acting "in the course of his duty" under § 53-39a. Specifically, the defendant observed that, "[a]s the [c]ourt instructed the jury, General Order

to his mouth. The complainants eventually left, squeezing by him in the narrow hallway, and the plaintiff saw them just once more that night, laughing and joking with each other as he investigated a separate altercation outside.

[8] Section 8-6 of the Connecticut Code of Evidence provides in relevant part: "The following are not excluded by the hearsay rule if the declarant is unavailable as a witness: (1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, provided (A) the issues in the former hearing are the same or substantially similar to those in the hearing in which the testimony is being offered, and (B) the party against whom the testimony is now offered had an opportunity to develop the testimony in the former hearing. . . ."

82-1 was in effect at the time of this incident and constituted a binding workplace rule and regulation, *unless the* [*c*]*hief of* [*p*]*olice and other ranking administration officials were aware of and tolerated a consistent pattern of violations of that order*, such that the [d]epartment acquiesced in a pattern or practice of disregard of the General Order." (Emphasis added.) Thus, "[a]s a part of his burden of proof in this case, [the plaintiff] was obligated to establish that violations of General Order 82-1 were ignored by, not merely lower-ranking . . . officers [of the department], but by [high-ranking] officials of the [d]epartment." The defendant contended that the plaintiff had failed to prove that his supervising officers had acquiesced in his presence inside Bar. Finally, the defendant claimed that the court had improperly excluded the complainants' prior testimony.

The trial court denied the defendant's motion.[9] In its memorandum of decision, the court explained that, contrary to the defendant's claim, the plaintiff presented sufficient evidence for a jury to conclude that the plaintiff remained within "the course of his duty" while inside Bar because the plaintiff's supervising officers were aware of, and had acquiesced in, similar violations of General Order 82-1 in the past. The court also rejected the defendant's contention that the court improperly had declined to admit the complainants' former testimony.

On appeal, the defendant claims that the trial court improperly instructed the jury on the meaning of the phrase "in the course of his duty" in accordance with principles borrowed from workers' compensation law

[9] In support of its posttrial motion, the defendant also claimed that the trial court improperly had declined to instruct the jury that the plaintiff's prior acquittal, standing alone, did not demonstrate that he had acted properly with the complainants. The trial court rejected this claim, however, and the defendant does not challenge that ruling on appeal.

and that the court improperly relied on such principles in rejecting the defendant's motion for postverdict relief. The defendant also contends that the trial court improperly excluded the testimony of the complainants after declining to find them "unavailable," as required by § 8-6 of the Connecticut Code of Evidence for the introduction of former testimony. Although we conclude that the defendant's first claim lacks merit, we agree with the defendant's claim under § 8-6, and, therefore, we reverse the trial court's judgment and remand the case for a new trial.[10]

I

The defendant first contends that the trial court improperly relied on workers' compensation principles in instructing the jury on the meaning of the phrase "in the course of his duty" under § 53-39a and in denying the defendant's postverdict motion. The defendant objects generally to the trial court's application of workers' compensation principles to § 53-39a, and specifically to the use of the principle that an employer may "acquiesce" in a particular practice by an employee, thereby making it a permissible "incident of the employment." As the foregoing procedural history demonstrates, however, the defendant failed to object to the use of such principles at trial, even in its motion for postverdict relief. Indeed, the record reveals that the defendant itself drew on workers' compensation principles in its request to charge and supplemental request to charge and, in fact, that it expressly requested that the court charge the jury in accordance with the principle of

[10] Following judgment, the trial court also denied the plaintiff's postjudgment motion for offer of compromise interest under General Statutes § 52-192a. The plaintiff cross appeals from that judgment, claiming that the trial court incorrectly determined that municipalities are immune to liability for such interest. Because this issue will arise on retrial only if the plaintiff prevails, we do not consider the plaintiff's cross appeal.

"employer acquiescence."[11] We therefore conclude that the defendant's claims regarding the construction of the statutory phrase "in the course of his duty" were not properly preserved for appeal. See Practice Book § 60-5 (this court "shall not be bound to consider a

[11] At oral argument before this court, the defendant asserted that it had preserved its statutory claims by objecting to one of the workers' compensation principles imported from *Kish* v. *Nursing & Home Care, Inc.*, 248 Conn. 379, 386, 727 A.2d 1253 (1999), namely, the notion that there is "no bright line test distinguish[ing] activities that are incidental to employment from those that constitute a substantial deviation therefrom." (Internal quotation marks omitted.) The related colloquy reveals, however, that the defendant did not object to the use of workers' compensation principles as such, but to the relevance of the specific language from *Kish* in the context of an alleged sexual assault—conduct that it claimed was *necessarily* a substantial deviation from the plaintiff's employment activities.

The defendant also claims that the evidentiary insufficiency claim advanced at trial preserved questions of statutory interpretation for purposes of appeal because "a statutory construction analysis of . . . § 53-39a . . . is necessary to determine whether the evidence below was sufficient." In support of this contention, the defendant cites three cases, none of which supports the proposition that statutory construction claims may be ignored at trial and then raised for the first time on appeal. At most, these cases reflect the fact that, at times, we do undertake a statutory construction analysis for the purpose of resolving a sufficiency of the evidence claim presented on appeal. See *State* v. *Moreno-Hernandez*, 317 Conn. 292, 294, 296, 299, 118 A.3d 26 (2015) (statutory claim on appeal, that certain subdivision of attempt to commit murder statute was inapplicable to defendant, had been considered by trial court); *State* v. *Drupals*, 306 Conn. 149, 156–59, 49 A.3d 962 (2012) (statutory claim on appeal, that trial court improperly determined that defendant had failed to register his new residence, as required by sex offender statute, "without undue delay"; General Statutes § 54-251 [a]; corresponded to defendant's testimony at trial that "on the basis of his understanding of the statutes, he had five days in which to notify the [sex offender registry] unit of a change of residence address, and that he was not required to provide notice of temporary or transient overnight visits"); *Bratz* v. *Harry Maring, Jr., Inc.*, 116 Conn. 186, 188–90, 164 A. 388 (1933) (plaintiff's claim on appeal was based on interpretation of proximate cause under statute that plaintiff had advanced in trial court and which that court rejected). None of these cases addresses the issue of preservation. In any event, adopting the defendant's view of preservation, whereby statutory construction claims are preserved simply by arguing at trial that the evidence is insufficient, would be inconsistent with the requirement that claims be raised "distinctly" at trial.

claim unless it was distinctly raised at the trial or arose subsequent to the trial").[12]

Although we would not ordinarily address the defendant's unpreserved statutory interpretation claim, we do so here because the issue necessarily will recur on retrial. Doing so is appropriate, moreover, because the claim involves a question of law briefed by both parties, and because the defendant cannot prevail on the claim. See *Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.*, 311 Conn. 123, 155–58, 84 A.3d 840 (2014) (record must be adequate for review, review cannot result in unfair prejudice to any party, and either [1] opposing party does not object to review or [2] party raising claim cannot prevail).

Section 53-39a provides indemnification for economic losses sustained by a police officer when that officer is prosecuted for, but subsequently acquitted of, a crime "allegedly committed by such officer in the course of his duty as such . . . ." See *Rawling* v. *New Haven*, 206 Conn. 100, 106, 537 A.2d 439 (1988) ("[A]ny person who invokes § 53-39a must sustain a twofold

[12] Alternatively, the defendant contends that it is entitled to prevail on this issue under the plain error doctrine. See Practice Book § 60-5. This claim lacks merit because, as explained hereinafter, both this court and the Appellate Court have stated that the phrase "in the course of his duty" under § 53-39a may be interpreted with reference to analogous language found in the workers' compensation statutes, and the legislature has given no indication that it disagrees with that interpretive approach. In such circumstances, it can hardly be said that the trial court's alleged error was so obviously and egregiously improper as to implicate the plain error doctrine. See *State* v. *Myers*, 290 Conn. 278, 289, 963 A.2d 11 (2009) ("Plain error is a doctrine that should be invoked sparingly. . . . Implicit in this very demanding standard is the notion . . . that invocation of the plain error doctrine is reserved for occasions requiring the reversal of the judgment under review. . . . [Thus, an appellant] cannot prevail under [the plain error doctrine] . . . unless he demonstrates that the claimed error is both so clear and so harmful that a failure to reverse the judgment would result in manifest injustice." [Citations omitted; internal quotation marks omitted.]).

burden of proof. In order to receive indemnity, a police officer must prove not only that the charges against him were dismissed, or that he was acquitted, but also that the charges arose 'in the course of his duty' as a policeman."). In *Link* v. *Shelton*, 186 Conn. 623, 627–28, 443 A.2d 902 (1982), after noting that the phrase "in the course of his duty" was not defined by statute or explained in the legislative history of § 53-39a, we turned to the construction of " '[a]rising out of and in the course of his employment,' " a parallel phrase used in workers' compensation statutes, to determine its meaning. See General Statutes § 31-275 (1). We concluded that a police officer who reported late to work and created a "disturbance" in the waiting area of the police station remained "in the course of his duty" for purposes of indemnification following his acquittal of the charge of breach of the peace. *Link* v. *Shelton*, supra, 628–29.

When we again were called on to consider the meaning of the phrase several years later, we explicitly acknowledged that "[*Link*] instructs us to construe the phrase 'in the course of his duty' by looking to the meaning of 'course of employment' under workers' compensation law." *Rawling* v. *New Haven*, supra, 206 Conn. 106. In *Rawling*, we determined that whether an officer was "in the course of his duty" under § 53-39a could be determined by a three-pronged test, focusing on whether the relevant conduct occurred "(a) within the period of the employment; (b) at a place the employee may reasonably be; and (c) while the employee is reasonably fulfilling the duties of the employment or doing something incidental to it." (Internal quotation marks omitted.) Id., 107, quoting *McNamara* v. *Hamden*, 176 Conn. 547, 550–51, 398 A.2d 1161 (1979); see *McNamara* v. *Hamden*, supra, 548, 550–51 (whether table tennis games on employer's premises were "incident of [plaintiff's] employment" for workers'

compensation purposes); footnote 6 of this opinion; see also *Mihalick* v. *Simsbury*, Docket No. 3-95-CV-1822 (WWE), 1997 WL 43111, *2 (D. Conn. January 10, 1997) (using workers' compensation principles to determine whether plaintiff was "in the course of his duty"); *Santana* v. *Hartford*, 94 Conn. App. 445, 452, 894 A.2d 307 (2006) (same), aff'd, 282 Conn. 19, 918 A.2d 267 (2007); *Crotty* v. *Naugatuck*, 25 Conn. App. 599, 603–604, 595 A.2d 928 (1991) (same).

In the present case, the defendant questions the propriety of relying on workers' compensation principles for purposes of § 53-39a, contending that workers' compensation statutes, being remedial in nature and liberally construed, are poorly suited to the interpretation of § 53-39a, which, as a statute in derogation of the common law and municipal immunity, must be strictly construed. The defendant argues that, under a strict interpretation of the statute, the plaintiff could not be physically present within Bar in violation of the department's orders while remaining "in the course of his duty" under § 53-39a, and, indeed, that police officers working "extra duty" shifts generally would not be covered by § 53-39a.

In arguing that we should overrule *Link* and *Rawling*, however, the defendant overstates the difference between workers' compensation principles and those principles that underlie indemnity statutes like § 53-39a. Indemnification, like workers' compensation, serves the remedial purpose of making an employee whole after suffering losses closely related to his or her employment. See, e.g., *Norwich* v. *Silverberg*, 200 Conn. 367, 369, 374, 511 A.2d 336 (1986) (municipal indemnification statute protecting employee from costs of action incurred "while acting in the discharge of his duties"; General Statutes § 7-101a [b]; was "designed to furnish some relief for injustice that would otherwise attend our [well established] doctrine of sovereign

municipal immunity"). Moreover, workers' compensation statutes, like indemnity statutes, are in derogation of the common law and governmental immunity. See, e.g., *DeOliveira* v. *Liberty Mutual Ins. Co.*, 273 Conn. 487, 499, 870 A.2d 1066 (2005) (workers' compensation scheme "compromise[s] an employee's right to a common law tort action for work related injuries in return for relatively quick and certain compensation" [internal quotation marks omitted]); *Dechio* v. *Raymark Industries, Inc.*, 114 Conn. App. 58, 77, 968 A.2d 450 (2009) (*Lavine, J.*, dissenting) (noting that workers' compensation statutes are in derogation of common-law remedies), aff'd, 299 Conn. 376, 10 A.3d 20 (2010).

In light of these similarities, we hesitate to find fault with cases that import concepts from one of these areas into the other. We are especially leery of doing so when the seminal cases construing § 53-39a simultaneously borrow definitions from workers' compensation *and* observe that § 53-39a is to be strictly construed. See, e.g., *Rawling* v. *New Haven*, supra, 206 Conn. 105, 112. In such a context, the defendant has not persuaded us that workers' compensation principles are so incompatible with § 53-39a as to require overruling *Link* and *Rawling*. See *Conway* v. *Wilton*, 238 Conn. 653, 660–61, 680 A.2d 242 (1996) ("[t]he doctrine [of stare decisis] requires a clear showing that an established rule is incorrect and harmful before it is abandoned" [internal quotation marks omitted]).[13]

[13] We also reject the defendant's argument that the presence of the qualifier "as such" in the phrase "in the course of his duty as such" necessarily distinguishes between "on-duty" police officers and police officers working "extra-duty" shifts. We agree with the plaintiff that *Plainfield* v. *Commissioner of Revenue Services*, 213 Conn. 269, 567 A.2d 379 (1989), and *Berlin* v. *Commissioner of Revenue Services*, 207 Conn. 289, 540 A.2d 1051 (1988), cases involving the tax implications of "extra duty" police work, shed little light on this inquiry. In *Plainfield*, for instance, we held that the police department rendered a "private," taxable service when it provided officers for "extra duty" work at a racetrack. *Plainfield* v. *Commissioner of Revenue Services*, supra, 274–76. We expressly determined, however, that the issue was "not the relationship of the officers to the [t]own, but whether the

Finally, we note again that the courts of this state have for the past thirty-five years relied explicitly and repeatedly on principles of workers' compensation law to interpret § 53-39a. During this time, the legislature has amended § 53-39a on multiple occasions without overruling this interpretive approach. See, e.g., Public Acts 2010, No. 10-68, § 1 (providing for recovery of legal fees charged in indemnification action); Public Acts 2003, No. 03-97, § 2 (allowing state police officers to pursue action under statute in Superior Court). As a result, in the absence of further guidance, we conclude that the legislature has acquiesced in our use of workers' compensation principles for interpreting the meaning of the phrase "in the course of his duty" under § 53-39a. See *Commission on Human Rights & Opportunities* v. *Sullivan Associates*, 250 Conn. 763, 783, 739 A.2d 238 (1999) ("[t]he legislature is presumed to be aware of the interpretation of a statute and . . . its subsequent nonaction may be understood as a validation of that interpretation"). If the legislature believes we have mistaken its silence, it can easily overrule us. In the absence of such overruling, however, the defendant cannot prevail on its statutory interpretation claims.

II

The defendant also contends that the trial court improperly excluded the former testimony of the complainants by failing to find that they were "unavailable" for purposes of the former testimony exception to the

[t]own [was] rendering services to the [d]og [t]rack." (Internal quotation marks omitted.) Id., 276. Thus, "the 'duty' status of the officers working at the dog track was irrelevant." Id., 275. In the present case, by contrast, it is precisely the relationship between the officer and the city that we must examine, and without more, we cannot say that the words "as such" lead unambiguously to the conclusion that a uniformed police officer employed for safety reasons by a nightclub, in coordination with the city, is *not* acting as a police officer under § 53-39a. Thus, it is appropriate to look to other similarly worded statutes for guidance in interpreting the phrase.

hearsay rule, which requires such a finding. We agree with this claim.

Section 8-6 (1) of the Connecticut Code of Evidence provides that the prior testimony of an unavailable witness may be admitted at a subsequent trial if the issues in the prior proceeding were "substantially similar" to those in the proceeding at which the testimony is being offered and the opposing party had an opportunity to develop that testimony at the earlier proceeding. See *State* v. *Rodriguez*, 68 Conn. App. 303, 311, 791 A.2d 621 (proponent of former testimony must satisfy two part test: witness is unavailable and prior testimony was reliable), cert. denied, 260 Conn. 920, 797 A.2d 518 (2002). In this case, there is no challenge to the trial court's determination that the prior testimony was reliable under § 8-6, and the plaintiff also makes no claim that the issues at the two trials were not substantially similar. We therefore review only the court's conclusion that the complainants were not unavailable.

We have held that "[d]ue diligence to procure the attendance of the absent witness is an essential predicate to unavailability." (Internal quotation marks omitted.) *Crochiere* v. *Board of Education*, 227 Conn. 333, 356, 630 A.2d 1027 (1993); see also *State* v. *Rivera*, 221 Conn. 58, 62, 602 A.2d 571 (1992) ("[a] proponent [of former testimony] must exercise due diligence and . . . make a good faith effort to procure the declarant's attendance" [internal quotation marks omitted]). At the same time, in demonstrating the witness' unavailability, "[a] proponent's burden is to demonstrate a diligent and reasonable effort, not to do everything conceivable, to secure the witness' presence." *State* v. *Lopez*, 239 Conn. 56, 77–78, 681 A.2d 950 (1996).

The defendant intended to have the complainants testify at trial to rebut the plaintiff's contention that he was "in the course of his duty" when, according to the

complainants, he assaulted them. When neither of the complainants appeared to testify at trial, however, the defendant moved to have their prior testimony from the criminal trial admitted into evidence under § 8-6 (1) of the Connecticut Code of Evidence. At the hearing on the defendant's motion, the defendant sought to demonstrate due diligence, as required for a finding of unavailability under § 8-6, by detailing its efforts to procure the complainants' attendance at trial. Counsel for the defendant first represented to the court that he "repeatedly" had been in touch by telephone with A, who lived in Longmeadow, Massachusetts, and that she had agreed to testify. Counsel further explained, however, that, on the eve of the trial, A indicated that she might have other plans, and thereafter stopped responding to counsel's calls. Counsel also informed the court that he had been in contact with J, an East Haven resident, "as recently as last week," and stated that she had also agreed to testify at the indemnification trial. Thereafter, counsel telephoned J "repeatedly" but was unable to leave a voice message. "[I]n an abundance of caution," he had also sought to have her served with a subpoena when she first indicated she might not be willing to attend. A judicial marshal then testified that he had tried unsuccessfully to serve J with the subpoena, going to her house five times during the prior week and attempting to serve her at work once.

Notwithstanding counsel's efforts, the trial court concluded, with respect to A, that, even though she was out of state and not amenable to subpoena in a civil action, the court could not find her "unavailable" in view of counsel's failure to attempt to "preserve her testimony" by deposition. The court made a similar finding as to J, the in-state witness, observing that counsel had sufficient time before trial to depose both complainants: "So what I'm saying is . . . that through the discovery process, you had an opportunity to notice

. . . the depositions of both young ladies. . . . [Y]ou [c]ould have . . . secure[d] their . . . testimony by way of deposition." The court further explained that "[J] is more compelling against not allowing her former testimony because she's right here in East Haven. Her deposition could have been secured months ago." On that basis, the court excluded the former testimony of both complainants.[14]

In its motion to set aside the verdict, the defendant argued that the trial court improperly concluded that the defendant had not exercised due diligence in procuring the complainants' attendance at trial, in part due to the imposition of a deposition requirement. The court denied the defendant's motion, concluding, once again, that the defendant "had ample opportunity to preserve the testimony of [the complainants] through deposition and did not do so." The court also determined that it was not permitted to rely on the representations of counsel regarding the defendant's efforts to secure the complainants' attendance and, therefore, was required to disregard the defendant's explanation of the complainants' sudden change of plans.

On appeal, the defendant claims that the court incorrectly predicated its finding of unavailability on the defendant's attempts to procure depositions from the

[14] We note that in deciding whether J was unavailable, the trial court also considered the defendant's efforts to secure her presence at trial by way of a subpoena and ultimately found those efforts "lacking." Ordinarily, such a finding, if supported by the record, would be sufficient to sustain the trial court's ruling excluding J's former testimony. In the present case, however, the court's analysis is so clearly shaped by its belief that the defendant had a duty to attempt to depose J that it is impossible to separate the other, valid metrics of diligence from the alleged deposition requirement. For example, even as the court declared its willingness to listen to the marshal's testimony, it stated that it would do so "keeping in mind that [J's] deposition should [have]—could have been secured . . . because the case law refers to other process and specifically refers to the taking of the deposition." As a consequence, we must treat the defendant's failure to comply with the purported deposition requirement as central to the trial court's reasoning.

complainants and that the court also incorrectly believed that it could not properly rely on defense counsel's representations regarding the complainants' unavailability. Because we agree with both of the defendant's claims, we conclude that the trial court improperly declined to admit the complainants' former testimony.

First, the trial court incorrectly required that the defendant attempt to depose the complainants as a precondition to the admission of their former testimony. In assessing whether a declarant is "unavailable" for the purpose of admitting evidence under an exception to the hearsay rule, we have stated that this court follows the definition of the term "unavailable" in rule 804 (a) of the Federal Rules of Evidence. See, e.g., *State* v. *Schiappa*, 248 Conn. 132, 141–42, 728 A.2d 466 ("[i]n determining whether the declarant is unavailable, we employ the definitions set forth in rule 804 [a] of the Federal Rules of Evidence"), cert. denied, 528 U.S. 862, 120 S. Ct. 152, 145 L. Ed. 2d 129 (1999). Rule 804 (a) (5) of the Federal Rules of Evidence provides that a declarant may be considered "unavailable" if he "is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure: (A) *the declarant's attendance*, in the case of a hearsay exception under [r]ule 804 (b) (1) [*former testimony*] or (6); or (B) *the declarant's attendance or testimony*, in the case of a hearsay exception under [r]ule 804 (b) (2), (3), or (4)." (Emphasis added.) Thus, as the Judiciary Committee's notes on rule 804 explain: "The [c]ommittee amended the [r]ule to insert after the word attendance the parenthetical expression (or, in the case of a hearsay exception under subdivision (b) (2), (3), or (4), his attendance or testimony). The amendment is designed primarily to require that an attempt be made to depose a witness (as well as to seek his attendance) as a precondition

to the witness being deemed unavailable. *The* [*c*]*ommittee*, *however*, *recognized the propriety of an exception to this additional requirement when it is the declarant's former testimony that is sought to be admitted under subdivision* (*b*) (*1*) [*concerning former testimony*]." (Emphasis added; internal quotation marks omitted.) Fed. R. Evid. 804, judiciary committee notes, House Report No. 93-650, 28 U.S.C. app., p. 1080 (2012).

In excluding the complainants' former testimony, the trial court relied primarily on *Schaffer* v. *Lindy*, 8 Conn. App. 96, 101, 511 A.2d 1022 (1986), overruled on other grounds by *Stuart* v. *Stuart*, 297 Conn. 26, 44, 996 A.2d 259 (2010), for the proposition that "an attempt [must] be made to depose a witness . . . as a precondition to the witness being deemed unavailable." (Internal quotation marks omitted.) That case, which involved the admissibility of a statement against penal interest, does indeed stand for the proposition that, *in certain situations*, the proponent of hearsay must attempt to depose the declarant. As the federal rules make clear, however, the deposition requirement discussed in *Schaffer* applies only to certain exceptions to the rule against hearsay, such as statements against penal interest under rule 804 (b) (3) of the Federal Rules of Evidence, and it does not apply to prior sworn testimony under rule 804 (b) (1) of the Federal Rules of Evidence.

Thus, the trial court's insistence that the defendant should have attempted to depose the complainants runs counter to the clear guidance provided by the federal rules and our established reliance on their provisions for assessing unavailability.[15] Indeed, imposing the addi-

[15] To be sure, we have not previously had occasion to consider whether the federal rules apply to the specific subsection of our evidence code pertaining to former sworn testimony like that at issue here. See Conn. Code Evid. § 8-6, commentary ("[I]n *State* v. *Frye*, 182 Conn. 476, 438 A.2d 735 (1980), the court adopted the federal rule's definition of unavailability for the statement against penal interest exception; id., 481–82 . . . . The court has yet to determine whether the definition of unavailability recognized in *Frye* applies to other hearsay exceptions requiring the unavailability of

tional hurdle of a deposition makes little sense in the context of prior sworn testimony. A deposition requirement applies to statements against penal interest because those statements do not necessarily provide the same indicia of reliability as sworn testimony, which is virtually identical to in-court testimony for purposes of reliability. See *Atwood* v. *Atwood*, 86 Conn. 579, 583, 86 A. 29 (1913) (noting that deposition testimony and prior in-court testimony are indistinguishable in terms of their reliability). In contrast, no deposition requirement exists for former testimony for the simple reason that it would impose significant burdens on parties without any corresponding benefit to the reliability of the testimony to be admitted.

The trial court also improperly declined to give weight to the defendant's "unsupported representations" regarding its efforts to procure the complainants' presence at trial, which the court determined were inadequate to support a claim of unavailability under *State* v. *Aillon*, 202 Conn. 385, 391, 521 A.2d 555 (1987). As the defendant maintains on appeal, however, *Aillon* does not stand for the proposition that the court may never rely on counsel's representations in determining the availability of witnesses once those representations are challenged by opposing counsel. In *Aillon*, defense counsel represented that "he had been advised that [the witness] was not presently willing to hold himself out as an expert on hair 'because he doesn't do that any longer.' " *State* v. *Aillon*, supra, 202 Conn. 389. However, counsel made "no attempt whatsoever to secure [the

the declarant." [Citations omitted.]); see also, e.g., *State* v. *Rivera*, supra, 221 Conn. 61–62 and n.2 (explaining that proponent of former testimony must "make a good faith effort to procure the declarant's attendance," rather than "attendance [or testimony]," but distinction was immaterial because proponent was unable to locate witness for either purpose). Neither the plaintiff nor the trial court, however, has provided any justification for departing from the well-reasoned approach of the federal rules or our established reliance on them for purposes of assessing "unavailability."

witness'] physical presence so that he might personally advise the court as to his present inability, or unwillingness, to testify as an expert hair analyst." Id., 391. As a result, this court held that, "[i]n the face of an objection by the state, the defendant did not satisfy his burden of proof through the unsupported representations of defense counsel that [the witness] was no longer qualified as an expert"; id.; because those representations provided no evidence as to whether the declarant was still qualified to testify as an expert, or whether he was "merely recalcitrant." Id., 392.

In the present case, by contrast, counsel's representations concerned the extent of the defendant's *own efforts* to procure the complainants' attendance, a matter that counsel was perfectly competent to explain. Indeed, "[i]t long has been the practice that a trial court may rely upon certain representations made to it by attorneys, who are officers of the court and bound to make truthful statements of fact or law to the court." (Internal quotation marks omitted.) *State* v. *Chambers*, 296 Conn. 397, 419, 994 A.2d 1248 (2010); see also *State* v. *Lopez*, supra, 239 Conn. 79 ("it is within the discretion of the trial court to accept or to reject the proponent's representations regarding the unavailability of a declarant"). Accordingly, the court was not required to disregard the defendant's representations on the issue of its diligence in procuring the complainants' attendance—the sine qua non of unavailability under our case law—even in the face of opposing counsel's objection to the use of such representations. Our conclusion in this regard is buttressed by the fact that the plaintiff's objection to defense counsel's representations was based solely on the assertion that the trial court was not permitted to rely on such representations in determining the reasonableness of counsel's efforts to secure the complainants' attendance at trial, and not on any claim that the representations were inaccurate.

In light of the interrelatedness of these errors, we cannot tell whether the trial court would have reached the same conclusion had its opinion been grounded in an accurate reading of the law. Nor can we view these errors as harmless, because, as the trial court repeatedly acknowledged and the plaintiff effectively conceded at trial, the complainants' testimony was critical to the defendant's claim that the plaintiff was not *acting* in the course of his duty during the relevant time period, even assuming that his employer acquiesced in his presence inside Bar.[16] See *Klein* v. *Norwalk Hospital*, 299 Conn. 241, 254–55, 9 A.3d 364 (2010) ("[A]n evidentiary impropriety in a civil case is harmless only if we have a fair assurance that it did not affect the jury's verdict. . . . A determination of harm requires us to evaluate the effect of the evidentiary impropriety in the context of the totality of the evidence adduced at trial." [Internal quotation marks omitted.]). Indeed, both the trial court and the plaintiff acknowledged that the complainants were the only two witnesses who could contradict the plaintiff's testimony regarding the details of their interaction at Bar. Although several other witnesses at the indemnification trial questioned the plaintiff's version of events, their testimony was not an adequate substitute for the complainants' firsthand account of the plaintiff's allegedly unlawful conduct inside Bar, testimony that could have provided strong support for the defendant's contention that the plaintiff's conduct was undertaken outside the course of his duty as a police officer. In this context, it cannot be said with any reasonable assurance that the exclusion of the complainants' former testimony did not affect the jury's verdict.

The judgment is reversed and the case is remanded for a new trial.

In this opinion the other justices concurred.

[16] Notably, the plaintiff himself does not argue on appeal that the trial court's errors were harmless; he merely contends that the trial court did not abuse its discretion in deeming the former testimony inadmissible.

STATE OF CONNECTICUT *v.* TYRONE LAWRENCE KELLEY
(SC 19694)

Rogers, C. J., and Palmer, Eveleigh, McDonald, Espinosa, Robinson and D'Auria, Js.*

Syllabus

Pursuant to statute (§ 53a-31 [b]), "[t]he issuance of a warrant" for a probation violation pursuant to the statute (§ 53a-32) governing such violations "shall interrupt the period of the sentence until a final determination as to the violation has been made by the court."

The defendant, who previously had been convicted of a narcotics offense and sentenced to imprisonment followed by a period of probation, appealed from the judgment of the trial court, which found him in violation of his probation on the basis of his subsequent arrest for various crimes. The defendant's five year period of probation commenced after his release from incarceration in 2008, and one of the conditions of probation required that he not violate the criminal law of any state. In October, 2009, the defendant was arrested and charged with various drug offenses, and an arrest warrant was issued shortly thereafter in December, 2009, for his alleged violation of probation. In 2011, while the probation violation charge was pending, the defendant again was arrested for his alleged commission of a robbery. The probation violation charge was tried with the robbery charge in 2014, more than four years after his arrest for violating probation and about eight months after his five year term of probation was originally scheduled to expire. After finding that the defendant had violated the conditions of his probation, the trial court rendered judgment revoking his probation and sentencing him to additional incarceration. On appeal to the Appellate Court, the defendant claimed, inter alia, that the trial court lacked subject matter jurisdiction to revoke his probation because it did not resolve the probation violation charge until after his original probation term was scheduled to expire. The Appellate Court concluded that the issuance of the arrest warrant for the defendant's violation of probation interrupted the running of the defendant's probation term pursuant to § 53a-31 (b) until the trial court resolved the probation violation charge and that the trial court thus had jurisdiction to revoke the defendant's probation. The defendant, on the granting of certification, appealed to this court. *Held* that the Appellate Court correctly determined that the trial court had subject matter jurisdiction when it revoked the defendant's probation: in accordance with the plain meaning of the text of § 53a-31 (b), the

* The listing of justices reflects their seniority status on this court as of the date of oral argument.

issuance of the warrant for the defendant's arrest for his probation violation in 2009 triggered the interruption of the running of his probation term until the trial court resolved the probation violation charge in 2014, and, accordingly, the defendant's five year probation term did not expire in 2013, when it was originally scheduled to expire, and the trial court did not lose jurisdiction to conduct a hearing and to revoke the defendant's probation in 2014; moreover, the defendant could not prevail on his claim that the trial court's failure to comply with the language in § 53a-32 (c) providing that, unless good cause is shown, a probation violation charge shall be disposed of or scheduled for a hearing not later than 120 days after the defendant is arraigned on such a charge meant that the defendant's probation term was not interrupted by the issuance of the warrant for the defendant's arrest, as the text of § 53a-31 (b) and the legislative history of the 120 day limit in § 53a-32 (c) made it clear that a failure to comply with the 120 day limit, even without a finding of good cause, does not impact the interruption of a probation sentence by the issuance of an arrest warrant under § 53a-31 (b).

Argued March 29—officially released September 5, 2017

Procedural History

Information charging the defendant with violation of probation, brought to the Superior Court in the judicial district of New Haven and tried to the court, *Vitale*, *J.*; judgment revoking the defendant's probation, from which the defendant appealed to the Appellate Court, *Gruendel*, *Alvord* and *West*, *Js.*, which affirmed the trial court's judgment, and the defendant, on the granting of certification, appealed to this court. *Affirmed*.

Robert E. Byron, assigned counsel, for the appellant (defendant).

Rocco A. Chiarenza, assistant state's attorney, with whom, on the brief, were *Michael Dearington*, former state's attorney, *Maxine V. Wilensky*, senior assistant state's attorney, and *Lisamaria Proscino*, former special deputy assistant state's attorney, for the appellee (state).

Opinion

D'AURIA, J. In this certified appeal, we address whether a trial court has subject matter jurisdiction

over a probation violation charge that is adjudicated after the defendant's probation sentence was originally scheduled to expire. The trial court in the present case found that the defendant, Tyrone Lawrence Kelley, had violated his probation conditions and revoked his probation, but it did so after his probation sentence was originally set to expire. The defendant claimed before the Appellate Court that the trial court lacked subject matter jurisdiction when it decided the violation charge. The Appellate Court disagreed and affirmed the trial court's judgment. *State* v. *Kelley*, 164 Conn. App. 232, 242, 244, 137 A.3d 822 (2016). We conclude that the defendant's probation sentence had not expired at the time the trial court decided the violation charge because, pursuant to General Statutes § 53a-31 (b),[1] the running of his sentence had been interrupted while the violation charge was pending. We therefore affirm the judgment of the Appellate Court.

The record reveals the following facts relevant to this appeal. The defendant was originally sentenced for a narcotics conviction to nine years of incarceration, execution suspended after four years, followed by five years of probation.[2] After he completed his period of incarceration, his probation began on September 19, 2008, and his sentence was originally scheduled to expire in September, 2013. His probation conditions included that he not violate the criminal law of any state. Thirteen months into his five year probation term, in October, 2009, the defendant was arrested and charged with a variety of drug related offenses. As a result, an arrest warrant was issued in December, 2009,

[1] General Statutes § 53a-31 (b) provides in relevant part: "The issuance of a warrant . . . for violation pursuant to section 53a-32 shall interrupt the period of the sentence until a final determination as to the violation has been made by the court. . . ."

[2] The defendant was convicted on one count of the sale of, or possession with intent to sell, a hallucinogenic or narcotic substance, in violation of General Statutes § 21a-277 (a).

and he was later arrested and charged with violating his probation conditions.

While the violation charge remained pending, the defendant was arrested again for robbery in August, 2011.[3] The defendant's violation charge was tried at the same time as his robbery charge, in May, 2014—more than four years after his arrest for violation of probation, and about eight months after his probation sentence was originally scheduled to expire. The precise reason for the delay in trying the violation charge is unclear from the record, although it appears that, at some point, the parties agreed to try the violation charge together with the defendant's robbery charge.[4]

After trial, the trial court found that the defendant had violated his probation conditions and concluded that further probation would serve no beneficial purpose. The trial court therefore rendered judgment revoking the defendant's probation and sentencing him to the remaining five years of incarceration that were suspended as part of his original sentence.

The defendant appealed from the judgment of the trial court to the Appellate Court, claiming for the first time that the trial court lacked subject matter jurisdiction to revoke his probation.[5] *State* v. *Kelley*, supra, 164

[3] The defendant was also arrested for robbery in June, 2013, and for home invasion in October, 2013.

[4] Although the defendant characterizes the delay as "unexplained," it appears he did not provide us with all of the trial court transcripts concerning the violation charge, which might have revealed the cause of the delay. Ordinarily, "[i]t is the responsibility of the appellant to provide an adequate record for review." *Brown & Brown, Inc.* v. *Blumenthal*, 288 Conn. 646, 656 n.6, 954 A.2d 816 (2008), quoting Practice Book § 61-10 (a). The lack of an explanation for the delay has no impact on our resolution of this appeal, because, as we explain further in this opinion, the defendant cannot prevail regardless of the reason for the delay.

[5] Ordinarily, an unpreserved claim is unreviewable on appeal. The defendant's unpreserved claim was properly before the Appellate Court, however, because it implicated subject matter jurisdiction, which may be challenged at any time, including for the first time on appeal. See, e.g., *State* v. *Velky*, 263 Conn. 602, 605 n.4, 821 A.2d 752 (2003).

Conn. App. 236. He argued that the trial court did not have jurisdiction because it did not resolve the violation charge until after his original probation term was scheduled to expire. See id. The Appellate Court disagreed that the sentence had expired. See id., 238. Consistent with its prior cases, the Appellate Court concluded that, pursuant to § 53a-31 (b), the issuance of a warrant for the probation violation interrupted the running of the probation sentence until the violation charge was adjudicated.[6] See id., 237–38. The Appellate Court therefore concluded that the defendant's probation sentence had not expired when the trial court decided the violation charge and that the trial court therefore had subject matter jurisdiction over the probation revocation proceeding. See id., 238, 242.

We granted certification to address the following question: "Did the Appellate Court properly determine that the trial court had subject matter jurisdiction over the defendant's violation of probation proceeding?" *State* v. *Kelley*, 321 Conn. 915, 136 A.3d 646 (2016). Applying plenary review; see, e.g., *State* v. *Fowlkes*, 283 Conn. 735, 738, 930 A.2d 644 (2007); we agree with the Appellate Court that the trial court had subject matter jurisdiction when it revoked the defendant's probation. Even if we assume, as the defendant urges, that a trial court loses jurisdiction over a violation of probation proceeding once the sentence expires, we nevertheless

[6] The Appellate Court has consistently concluded that, under § 53a-31 (b), the issuance of an arrest warrant for a violation under General Statutes § 53a-32 essentially tolls the running of the sentence until the trial court resolves the violation charge. See *State* v. *Gibson*, 114 Conn. App. 295, 318, 969 A.2d 784 (2009), rev'd in part on other grounds, 302 Conn. 653, 31 A.3d 346 (2011); *State* v. *Johnson*, 75 Conn. App. 643, 656–57, 817 A.2d 708 (2003); *State* v. *Klinger*, 50 Conn. App. 216, 221–22, 718 A.2d 446 (1998); *State* v. *Yurch*, 37 Conn. App. 72, 83, 654 A.2d 1246 (1995); *State* v. *Egan*, 9 Conn. App. 59, 73, 514 A.2d 394 (1986); see also Black's Law Dictionary (10th Ed. 2014) p. 1716 (defining verb "toll" as "to stop the running of; to abate"). As we explain in this opinion, we agree with the Appellate Court's interpretation of § 53a-31 (b).

conclude that the defendant's probation sentence in the present case had not yet expired when the trial court revoked his probation.[7]

"Probation is the product of statute." *State* v. *Smith*, 207 Conn. 152, 167, 540 A.2d 679 (1988). To determine whether the defendant's probation expired before his revocation trial, we therefore look to the relevant probation statutes, mindful of the plain meaning rule codified at General Statutes § 1-2z.

The statutes governing probation establish that the timely issuance of an arrest warrant for a probation violation interrupts the running of the sentence, and the sentence remains interrupted until the court resolves the violation charge. Specifically, under § 53a-31 (a), when a defendant's sentence of probation follows a period of incarceration, probation commences on the day of the inmate's release from incarceration and generally continues until its scheduled expiration under the terms of the original sentence imposed by the trial court. The running of the probation sentence may be "interrupt[ed]," however, under certain circumstances. General Statutes § 53a-31 (b). One such circumstance is when a probationer violates one of the conditions of his probation and an arrest warrant is issued for that violation under General Statutes § 53a-32. In that circumstance, § 53a-32 (a) allows the probation officer to obtain an arrest warrant, which must be obtained during the period of the defendant's probation sentence. Under § 53a-31 (b), the issuance of such a

[7] The state contends that the issue in this case implicates the trial court's authority instead of its jurisdiction. See *State* v. *Fowlkes*, supra, 283 Conn. 746 ("Although related, the court's authority to act pursuant to a statute is different from its subject matter jurisdiction. The power of the court to hear and [to] determine, which is implicit in jurisdiction, is not to be confused with the way in which that power must be exercised in order to comply with the terms of the statute." [Internal quotation marks omitted.]). Because we conclude that the defendant cannot prevail even if the issue is one of jurisdiction, we need not address this distinction.

warrant automatically triggers an "interrupt[ion]" of the probation sentence, essentially tolling the sentence until the violation charge is adjudicated. Section 53a-31 (b) provides in relevant part that "[t]he issuance of a warrant . . . for violation pursuant to section 53a-32 shall interrupt the period of the sentence until a final determination as to the violation has been made by the court." The statute thus unambiguously provides that the probation sentence is interrupted upon the timely issuance of an arrest warrant, and the sentence remains interrupted until the trial court resolves the violation charge.

During the interruption, the defendant must comply with the conditions of probation imposed by his original sentence, even though he is not serving his probation sentence while the violation charge is pending. General Statutes § 53a-31 (c). At the violation hearing, if a violation of probation is established, the trial court has the option of simply continuing the term of probation, which would resume the running of the probation sentence, or imposing other penalties, including a revocation of the defendant's probation. General Statutes § 53a-32 (d).

In the present case, the defendant was released from prison on September 19, 2008, and his probation commenced that same day. See General Statutes § 53a-31 (a). Given that the court originally sentenced him to five years of probation, his probation would have expired in September, 2013, as scheduled, if he had not been arrested for any violations. In December, 2009, however, an arrest warrant was issued for his violation of the probation condition prohibiting him from violating the criminal law of any state. The defendant's arrest warrant was issued expressly for the defendant's violation of § 53a-32. In accordance with the plain meaning of § 53a-31 (b), the issuance of the warrant interrupted the running of his sentence of probation after the defen-

dant had served just fifteen months of that sentence, and it remained interrupted until the trial court resolved the violation charge in May, 2014.

Given the valid interruption of the sentence from December, 2009, until the trial court's resolution of the violation charge in May, 2014, the defendant's probation did not expire in September, 2013, as originally scheduled. In fact, more than three years still remained on his probation sentence as of the resolution of the violation charge in May, 2014. Because his probation had not yet expired, the trial court did not lose subject matter jurisdiction to conduct the probation violation hearing and revoke the defendant's probation in May, 2014. Accordingly, the trial court's revocation of probation and institution of the defendant's original suspended sentence was proper, and we reject the defendant's argument that the trial court lacked subject matter jurisdiction over his probation violation proceeding.

The defendant agrees that § 53a-31 (b) allows for the interruption of a probation sentence but nevertheless argues that his probation sentence was not interrupted. He contends that the interruption contemplated in § 53a-31 (b) applies only when the arrest warrant is issued "pursuant to section 53a-32," and § 53a-32 (c) provides in relevant part that, "[u]nless good cause is shown, a charge of violation of any of the conditions of probation . . . shall be disposed of or scheduled for a hearing not later than one hundred twenty days after the defendant is arraigned on such charge." The defendant contends that, because the trial court did not comply with the 120 day time limit, and otherwise did not find good cause for delaying the hearing, the issuance of the warrant was no longer pursuant to § 53a-32, and his probation sentence was not interrupted under § 53a-31 (b).[8] We disagree.

[8] The defendant's argument differs somewhat from the argument he made in the Appellate Court concerning the 120 day time limit and its impact on the trial court's subject matter jurisdiction. See *State* v. *Kelley*, supra, 164

The interruption under § 53a-31 (b) is triggered simply by the *issuance* of a warrant pursuant to § 53a-32, regardless of how long it takes the trial court to resolve the violation charge. See General Statutes § 53a-31 (b) ("[t]he issuance of a warrant . . . for violation pursuant to section 53a-32 shall interrupt the period of the sentence until a final determination as to the violation has been made by the court"). Section 53a-31 (b) contains no other conditions for triggering an interruption of the sentence, and nothing in that section makes continued interruption contingent on compliance with the 120 day time limit in § 53a-32 (c). Although § 53a-32 contains numerous procedures for resolving a violation charge, § 53a-31 (b) does not require compliance with all of them to maintain the interruption of the defendant's sentence. Instead, by the terms of § 53a-31 (b), the interruption commences when the warrant is issued, and it continues until the trial court finally determines the violation charge, whenever that may be. Whatever the consequence may be for failing to comply with the 120 day time limit, it has no impact on the interruption of the probation sentence.

Even if it were unclear whether the legislature intended the 120 day limit in § 53a-32 (c) to impact the interruption of the probation sentence, the legislative history of the public act that established the 120 day limit dispels any doubt about our conclusion.[9]

Conn. App. 239–42. The state therefore argues that the defendant's newly cast argument is not properly preserved and that we should therefore decline to address it. We conclude that, even if the defendant would ordinarily be required to preserve these arguments by raising them in the trial court or the Appellate Court, we must address them because they implicate the trial court's subject matter jurisdiction. See footnote 5 of this opinion.

[9] The defendant suggests that, if § 53a-31 (b) is ambiguous about whether a trial court must comply with the 120 day limit in § 53a-32 (c), then any ambiguity should be resolved in the defendant's favor under the rule of lenity. We disagree. Although "[t]he touchstone of [the] rule of lenity is statutory ambiguity," it is also true that "courts do not apply the rule of lenity unless a reasonable doubt persists about a statute's intended scope *even after resort to the language and structure, legislative history, and*

The 120 day limit was adopted as part of No. 08-102 of the 2008 Public Acts (P.A. 08-102), which amended several of the probation statutes. The legislative history surrounding P.A. 08-102, § 7, unequivocally demonstrates that the legislature did not intend for a failure to comply with the 120 day limit to carry any consequences affecting the defendant's probation sentence. During the floor debate in the House of Representatives, Representative Michael P. Lawlor explained the extent to which noncompliance with the 120 day provision was intended to have consequences. He stated, "this is basically a *guideline*, *goal*," and, consequently, "there may be circumstances . . . [that] require an extension of time . . . ." (Emphasis added.) 51 H.R. Proc., Pt. 13, 2008 Sess., p. 4225. "There would be *no right of the defendant to have a hearing in* [*120*] *days under this* . . . ." (Emphasis added.) Id. "It is . . . *advisory* on the court . . . ." (Emphasis added.) Id. He reiterated that "[t]here may be circumstances [that] the court can deal with on a case-by-case basis . . . [that require] an extension of that period of time . . . ." Id., p. 4226.

One legislator, State Representative Arthur J. O'Neill, asked directly about the consequences of a judge's failure to dispose of the matter within 120 days: "[I]n the event that a judge does not dispose of the matter within 120 days, and also at the same time fails to find good cause for not disposing of it within that 120 days, is there a penalty on anyone, and if so, what is it?" Id. Representative Lawlor replied: "I guess the penalty is . . . sooner or later the judge's term is going to come up for expiration, and [has] to come back before the [l]egislature." Id., p. 4227. "Individual judges are being informed that this will be a part of their confirmation

motivating policies of the statute." (Emphasis in original; internal quotation marks omitted.) *State* v. *Lutters*, 270 Conn. 198, 219, 853 A.2d 434 (2004). As we explain in this opinion, we have no such doubt about the meaning of the statutes at issue in the present case.

process. If they are consistently late . . . then they will be questioned on that extensively before the court." Id. "So I think at the end of the day that is the real penalty." Id., p. 4228.

The legislative history is thus devoid of any indication that the legislature intended the 120 day limit to have any consequences affecting the length of a defendant's probation.[10] Trial judges should, of course, diligently seek to comply with the time limitation or find on the record good cause for delaying resolution of a violation charge. We conclude, however, that exceeding the 120 day limit, even without a finding of good cause, does not impact the interruption of a probation sentence under § 53a-31 (b). We therefore reject the defendant's argument that a trial court's failure to comply with this time limit impacts the running of his probation sentence.[11]

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.

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[10] The defendant cites to *State* v. *Kevalis*, 313 Conn. 590,99 A.3d 196 (2014), for the proposition that the revocation hearing "must" take place within the 120 day timeframe. That case, however, focused on an accelerated rehabilitation statute; see id., 600–601; and its cursory summary of § 53a-32 without any analysis of its provisions was dictum. See id., 602. *Kevalis* also did not address the consequences, if any, of failing to comply with the 120 day time limit.

[11] Because the defendant did not file all of the trial court transcripts concerning the violation charge with this court; see footnote 4 of this opinion; we do not know whether the trial court made a good cause finding on the record in this case. Because we reject the defendant's interpretation of §§ 53a-31 (b) and 53a-32 (c), however, we do not consider the impact of an inadequate record.