EVELEIGH, J., with whom VERTEFEUILLE, J., joins, dissenting. I respectfully dissent. I agree with the majority that the test set forth in *Varley* v. *Varley*, 180 Conn. 1, 428 A.2d 317 (1980), requires alteration. I disagree, however, with the majority's decision only to change the fourth prong of the test in *Varley* as applied to "motions for a new trial based on the discovery misconduct of the nonmoving party." I would overrule *Varley* in its entirety as it applies to all cases of this nature. For that reason, I disagree with the majority's resulting conclusion that a motion for a new trial based on discovery misconduct by the nonmoving party should not be granted unless the movant "demonstrate[s] a reasonable probability, rather than a substantial likelihood, that the result of a new trial will be different." In my view, the majority's placement of the burden on the party that was denied full disclosure during discovery to demonstrate a reasonable probability that unproduced or undisclosed information would alter the result at a new trial excuses, if not rewards, noncompliant behavior on the part of the opposing party, whether the plaintiff or the defendant, runs counter to the modern trend of requiring wrongdoers to shoulder the burden of establishing that their conduct did not aggrieve the innocent party, and fails to hold counsel to the high ethical standards set forth in our rules of practice.

Contrary to the majority, I would instead conclude that, when a party moves for a new trial on the basis of discovery noncompliance, that party must first establish by a fair preponderance of the evidence that there has been substantial noncompliance with a discovery request or order (i.e., nonproduction of one photograph in automobile accident case when other, similar photographs were produced would not be substantial), and that the noncompliance was relevant to the trial court's ultimate determination (i.e., defendant's noncompliance regarding plaintiff's question on damages would not be relevant to defendant's verdict on liability). Once this showing is satisfied, a rebuttable presumption should arise in favor of the movant that the unproduced or undisclosed information was material to the issues at trial, including the movant's full and fair preparation therefor. I would define materiality to mean, in this context, that if produced there was a reasonable possibility that the result of the trial could have been different. The burden would then fall on the allegedly noncompliant party to rebut the presumption and to demonstrate that the unproduced or undisclosed information was not material to the case (i.e., that if produced there was no reasonable possibility that the result of the trial could have been different). If the court finds that the presumption is not rebutted, the motion for a new trial should be granted. Accordingly, I would

reverse the judgment of the Appellate Court and remand the case to that court with direction to remand the case to the trial court for further proceedings in accordance with this framework.

I begin by noting that I agree with the underlying facts and procedural history recited by the majority. I briefly highlight, however, the following relevant facts as either set forth in the majority opinion, in the trial court's memorandum of decision, or contained in the record. On March 31, 2003, the plaintiff, Bonnie Duart, served requests for production on her employer, the defendant, the department of correction, seeking the plaintiff's "personnel file,"[1] as well as the personnel files of her supervisors, Duane Kelley and Wayne Valade, in connection with the plaintiff's claims of discrimination on the basis of gender and sexual orientation. The plaintiff also sought "all documents relating to complaints filed by [employees of the defendant] against [Kelley and Valade]." In response to these specific requests and others, the defendant disclosed information and produced various materials except for the three items that formed the basis of the plaintiff's motion for a new trial and prompted the subsequent appeals. First, the plaintiff claimed that the defendant did not disclose until the end of trial a so-called "anonymous note" alleging that the plaintiff was involved in a romantic relationship with another female officer in the same line of command. Second, the plaintiff claimed that the defendant failed to disclose developments in its investigation of a sexual discrimination complaint filed by Catherine Osten, a lieutenant of the defendant, in September, 2002, regarding alleged sexual harassment by Kelley and Valade. Third, the plaintiff claimed that the defendant failed to disclose the existence of a harassment complaint filed by Lisa Jackson, another lieutenant of the defendant, who was homosexual, against Kelley and Osten in September, 2002.

The trial court, in its memorandum of decision denying the plaintiff's motion for a new trial, concluded that the defendant's failure timely to disclose a copy of the actual anonymous note "did not so taint the process as to in all equity warrant a new trial" on the basis of the court's determination that, even if the defendant had disclosed the anonymous note to the plaintiff, the plaintiff failed to demonstrate that the note would have brought " 'success in its wake,' " or, in other words, would have resulted in a favorable verdict.[2] Although the trial court acknowledged that, "[a]dmittedly, [the] case had as its main focus discrimination on the basis of sexual orientation," it reasoned that the "general contents [of the note] alleging a romantic relationship with another female correctional officer was pointed out to the jury numerous times," "[t]he existence of the note was not hidden, [and] the central thrust of its contents had been known during the entire pendency of the case."

Regarding the defendant's failure to disclose the developments in the Osten complaint and the existence of the Jackson complaint, the trial court found that "[t]here is no question that these documents were germane to the case and requested in discovery. There is also no question that none of these documents were produced by the defendant, although they should have been. Certainly the details of the complaints could have been used to test the credibility of [Valade and Kelley] at trial." The trial court later "conclude[d] from reviewing this after-discovered evidence that it, too, should have been produced during the discovery phase (except for the outcome of [Osten's] complaint, which only became known later) and had been properly requested." Thus, according to the trial court's express findings, the first prong of the test that I propose would have been satisfied. The trial court also noted that "the plaintiff was not dilatory in her efforts to secure all information she needed for the trial." As to the Osten complaint, the trial court concluded, however, that the undisclosed materials were cumulative because Osten had testified at trial and, therefore, the jury had before it the facts relating to her complaint against Valade and Kelley. The trial court noted, however, that the "gravamen of the after-discovered [Osten complaint] evidence . . . was not the complaint itself, but [rather] the action that the [defendant] took after [the Osten] investigation." Specifically, the defendant's investigation initially concluded that there was discriminatory conduct on the part of Kelley, although the trial court noted that this conclusion was eventually "overridden . . . ." The trial court reasoned, however, that because the final outcome of the Osten complaint was not known until after the trial in the present matter had concluded, this final outcome could not have been disclosed because it was not known. With regard to the undisclosed Jackson complaint, the trial court simply concluded that the "complaint filed by [Jackson] is also cumulative of other evidence at trial."

Motions for a new trial pursuant to Practice Book § 16-35[3] are "addressed to the sound discretion of the trial court and will never be granted except on substantial grounds." (Internal quotation marks omitted.) *Bernier* v. *National Fence Co.*, 176 Conn. 622, 628, 410 A.2d 1007 (1979). Practice Book § 13-14 (a), which governs failures to comply with interrogatories and requests for production, provides in relevant part: "If any party has failed to answer interrogatories or to answer them fairly, or has intentionally answered them falsely or in a manner calculated to mislead, or has failed to respond to requests for production . . . or has failed to comply with the provisions of Section 13-15 . . . or has failed otherwise substantially to comply with any other discovery order made pursuant to Sections 13-6 through 13-11, the judicial authority may, on motion, make such order as the ends of justice require."[4] I note that the

Practice Book provides for these sanctions, regardless of whether the failure to disclose was deemed to be intentional.

Pursuant to Practice Book § 16-35, I would conclude that "substantial grounds" exist warranting the granting of a motion for a new trial due to noncompliance under the following circumstances. First, the movant must demonstrate that the nonmoving party failed to comply with its obligations under Practice Book § 13-14 when the allegedly noncompliant party failed to disclose or produce information requested in discovery. This showing would require the movant to demonstrate that the nonmoving party's substantial noncompliance was not a result of the discovery requests being susceptible to more than one reasonable interpretation. Second, the alleged substantial noncompliance must be relevant to the trial court's ultimate determination. Additionally, and consistent with the language of Practice Book § 13-14, I would conclude that whether the noncompliant party's failure to produce information in response to a discovery request was intentional, negligent or accidental is immaterial to the analysis of whether that party was, in fact, substantially noncompliant with the movant's discovery requests.[5] The manner of substantial noncompliance—for example, intentional misconduct—may subject the offending attorney to a grievance procedure. The effect on the innocent party, however, is the same: the material requested in discovery was not received and available for use in trial preparation and, if admissible, at trial. Upon a successful showing of relevant substantial noncompliance, a rebuttable presumption would arise in favor of the movant that the unproduced information was material to its case, including the movant's full and fair preparation therefore, in that there is a reasonable possibility that had the unproduced material or information been provided, the result of the trial could have been different. Thereafter, the noncompliant party would have the burden of rebutting the aforementioned presumption. Specifically, if the noncompliant party fails to demonstrate that the unproduced or undisclosed information was immaterial to the movant's case (i.e., that there is no reasonable possibility that the result of the trial could have been different), the motion for a new trial should be granted.

In devising this standard, I would explicitly overrule *Varley* v. *Varley*, supra, 180 Conn. 4,[6] as it relates to discovery noncompliance, whether intentional, negligent or accidental.[7] I believe that the concerns expressed in *Varley* are adequately addressed by the Practice Book, time limitations on motions for a new trial, and the new test that I have proposed. In my view, this framework places both an appropriate onus on the movant—namely, by requiring that party to demonstrate relevant substantial noncompliance by the nonmoving party—while also properly placing the burden

on the nonmoving party to rebut the presumption that its noncompliance prejudiced the movant by denying that party information or evidence material to the issues at trial or the movant's preparation thereof. I feel that the standard of a "reasonable probability . . . that the result of a new trial will be different," now adopted by the majority, is much too onerous a standard for the moving party for three reasons. First, who can prove such a future outcome in a trial? The vagaries of both the jury system and court trials defy predictability, so the focus should be on the impact of the discovery noncompliance on the trial that has just occurred. Second, as a reasonable probability suggests the necessary showing is more likely than not, I believe the burden is too high and improperly denies the movant a new trial where he or she has a plausible chance of prevailing. Third, I believe that the placement of a threshold burden on the aggrieved party and a rebuttal burden on the noncompliant party is more equitable to the parties and the trial court making the final decision. In my view, "[a]s between guilty and innocent parties, the difficulties created by the absence of evidence should fall squarely upon the former." *Anderson* v. *Cryovac, Inc.*, 862 F.2d 910, 925 (1st Cir. 1988).[8] My proposed standard accomplishes this, while the majority's framework does not.

I find instructive other recent decisions of this court in which we have concluded that, as between an innocent party and a wrongdoer, the latter should bear the burden of establishing that their wrongful conduct did not prejudice the innocent party. Thus, for instance, in creating the tort of intentional spoliation of evidence, this court devised a burden shifting scheme under which the plaintiff first "must prove that the [defendant's] intentional, bad faith destruction of evidence rendered the plaintiff unable to establish a prima facie case in the underlying litigation." *Rizzuto* v. *Davidson Ladders, Inc.*, 280 Conn. 225, 246, 905 A.2d 1165 (2006). "Once the plaintiff satisfies this burden, there arises a rebuttable presumption that but for the fact of the spoliation of evidence the plaintiff would have recovered in the pending or potential litigation . . . ." (Internal quotation marks omitted.) Id., 247. "The defendant may rebut this presumption by producing evidence showing that the plaintiff would not have prevailed in the underlying action even if the lost or destroyed evidence had been available." (Internal quotation marks omitted.) Id., 247–48. This burden shifting framework acknowledged "the difficulties of proof inherent in the tort of intentional spoliation of evidence"; id., 246; and, as with the creation of the cause of action itself, stemmed from "[t]he most elementary conceptions of justice and public policy [requiring] that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created." (Internal quotation marks omitted.) Id., 245.

Similarly, in *Ramin* v. *Ramin*, 281 Conn. 324, 348, 915 A.2d 790 (2007), this court was presented with the question of which party should bear "the burden of establishing the harm flowing from the trial court's error," namely, that court's improper refusal to consider the plaintiff's motion for contempt and sanctions against the defendant regarding his repeated failure to comply with the court's discovery orders. In electing to place the burden on the wrongdoer, rather than the party claiming error, we reasoned that "it would be grossly unfair to the plaintiff to require her to establish precisely how she was harmed in proving her case by not having access" to the withheld materials when the plaintiff never had access to that information because the trial court refused to consider her motion regarding the defendant's discovery conduct. Id. Additionally, because "the defendant remained in total control of all of the materials sought by the plaintiff and ordered to be disclosed to her by the court . . . [the defendant] reasonably could be expected to be able to establish that the materials would not have helped the plaintiff prove her case."[9] Id., 349. Thus, the court in *Ramin* held that the party who committed discovery misconduct should bear the burden of proving its misconduct was harmless. Id., 348–49. That court reasoned that it was "grossly unfair" to require the victim of discovery misconduct to have the burden of proving harm. Id., 348. In my view, this is another way of saying that the victim of discovery noncompliance (I prefer to use the term noncompliance rather than misconduct because I believe that intent is irrelevant to the harm suffered) should not have to show that the noncompliance was result altering. Indeed, how does a party make such a showing when its claim is that the discovery noncompliance prevented it from having the materials or information necessary to carry that burden? I believe that the test that I have offered presents a more equitable approach to the problem.

I would conclude that these and other policy considerations support the principle that the allegedly noncompliant party should bear the burden of rebutting the presumption that its substantial noncompliance with the movant's discovery requests was material to the issues at trial, including the movant's full and fair preparation thereof. First, the nonmoving party, as the noncompliant party, should bear the risk of uncertainty, including the potential for a new trial, which follows in the wake of its noncompliant conduct. As between the noncompliant party, which operates under obligations imposed by our rules of practice to produce and disclose requested information; see Practice Book §§ 13-7, 13-10 and 13-15; and the movant adversely affected by incomplete discovery production, I would conclude, as this court did in *Rizzuto*, that "[t]he most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the

uncertainty which his own wrong has created." (Internal quotation marks omitted.) *Rizzuto* v. *Davidson Ladders, Inc.*, supra, 280 Conn. 245.

Second, placing the burden on the noncompliant party to demonstrate that its substantial noncompliance was not material to the issues at trial is, under the circumstances, more likely to assist the trial court in evaluating the impact that the unproduced information would have had, either on the trial, or on the movant's preparation in support thereof. This is true because the noncompliant party, as the party continuously in possession of the unproduced information, would be in the best position to articulate and "establish that the [requested but unproduced or undisclosed] materials would not have helped the [movant] prove her case." *Ramin* v. *Ramin*, supra, 281 Conn. 349. Similarly, "it would be grossly unfair to the [movant] to require her to establish precisely how she was harmed in proving her case" when the movant never had access to, or possibly an awareness of, information undisclosed or unproduced during trial but thereafter discovered. Id., 348.

Third, shifting the burden onto the noncompliant party to disprove the adverse presumption promotes the policy of full compliance with discovery requests set forth in our rules of practice. See Practice Book §§ 13-7, 13-10 and 13-15.[10] The disapproval of incomplete or noncompliant discovery is expressed in Practice Book § 13-14, which provides an aggrieved party with various remedies for nondisclosure uncovered in the period leading up to and including trial. Our policy mandating full and accurate disclosure and production of materials requested during discovery as an essential component of a fair trial is, in my view, equally valid when noncompliance that occurs before or during trial is discovered afterward. This renders the proceeding amenable to a motion for a new trial on the basis of discovery noncompliance because the fairness of that proceeding is called into question when the movant was denied full and complete discovery disclosure and production. Such disclosure and production may have been helpful to the movant's case at trial, may have been helpful in settlement negotiations, or may have led the movant to other relevant information, through depositions or additional discovery requests.

Fourth, I believe that the aforementioned framework comports with the ethical obligations of counsel pertaining to discovery. Rule 3.4 (1) of the Rules of Professional Conduct provides that an attorney shall not "[u]nlawfully obstruct another party's access to evidence," and rule 3.4 (4) of the Rules of Professional Conduct provides that counsel shall not, "[i]n pretrial procedure . . . fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party . . . ." As the commentary to the

rule makes clear: "The procedure of the adversary system contemplates that the evidence in a case is to be marshaled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence . . . .

"Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party . . . to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed," or, in my view, simply not produced to the requesting party. Rules of Professional Conduct 3.4, commentary.

In its decision to modify the fourth prong of *Varley*, the majority offers several reasons why any rule other than the one it sets forth should not be adopted. First, the majority notes that its requirement that there exist for civil litigants a "reasonable probability . . . that the result of a new trial will be different," is akin to the burden placed on a criminal defendant, alleging that the prosecution's failure to disclose evidence material to guilt or punishment violated his due process rights, to show "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." (Internal quotation marks omitted.) *United States* v. *Bagley*, 473 U.S. 667, 682, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985); see also *Brady* v. *Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). Second, the majority claims that their rule comports with our interest in finality of judgments and that any rule disturbing the repose of judgments should be reserved for exceptional circumstances. Third, the majority states that a rule other than theirs "would invite endless litigation and deplete judicial resources." Fourth, the majority claims that, "[g]iven the breadth of discovery in modern trial practice, it is inevitable that the movant could find some fault with the other party's compliance with broadly phrased discovery requests," and that requiring the noncompliant party to prove its actions were harmless "would impose an insupportable burden on the nonmoving party to disprove amorphous assertions . . . ." For the reasons that follow, I disagree with each of the majority's assertions.

First, although in the criminal context it is the defendant who bears the burden of establishing that he is entitled to a new trial on the basis of a violation of his right under *Brady* v. *Maryland*, supra, 373 U.S. 87, to disclosure of material evidence,[11] I would conclude that under our civil rules of practice, it is the noncompliant party, as the wrongdoer, that should bear the burden of establishing that its failure to disclose information or produce evidence did not aggrieve the otherwise

innocent movant. Whereas the considerations underlying *Brady* include questions of federal constitutional law, and procedural and substantive due process rights of criminal defendants,[12] the present case involves questions of state civil procedure and whether this court wishes to adopt a change, consistent with our rules of practice, on the basis of policy considerations.[13] Although sparingly employed, this court certainly has the power to adopt rules, tests or orders that it deems appropriate to enhance the fair administration of justice in this state. See *In re Joseph W.*, 301 Conn. 245, 268, 21 A.3d 723 (2011); *State* v. *Garcia*, 299 Conn. 39, 61 n.13, 7 A.3d 355 (2010); *State* v. *Lockhart*, 298 Conn. 537, 576, 4 A.3d 1176 (2010). Further, the majority offers no explanation why its test focuses on the likelihood of a different result at a new trial, rather than, as in *Brady*, whether the result of the original proceeding would have been different had the evidence been disclosed to the defense. Accordingly, I do not find the federal criminal standard instructive in this matter or in conflict with the framework that I propose.

Second, as to finality, I initially note that, under our rules of practice, a motion for a new trial must be filed within ten days after a verdict is accepted. Practice Book § 16-35. In this short span of time, reliance on the judgment would likely have been minimal and, therefore, a possibly improperly obtained verdict in favor of the allegedly noncompliant party should not be upheld in favor of repose. For the same reason, although the verdict may be "final," we must balance the admittedly strong interests underpinning the principles of finality and repose of judgments with the equally strong principle that parties must comply with our rules of practice in order to ensure that both sides are afforded the fair trial to which all sides are entitled. According to the majority's reasoning, if a movant satisfies its test by demonstrating a reasonable probability that the undisclosed or unproduced information would yield a different result in a new trial, then a "good and compelling reason" exists; *Steve Viglione Sheet Metal Co.* v. *Sakonchick*, 190 Conn. 707, 713, 462 A.2d 1037 (1983); warranting the disturbing of finality through the granting of a motion for a new trial. I, too, would conclude that undisclosed or unproduced information that would have been substantially responsive to discovery requests and was found to be material to the issues at trial, unrebutted by the noncompliant party, constitutes a "good and compelling reason" warranting the granting of a motion for a new trial. Id. My disagreement with the majority instead concerns, first, on which trial the impact of the noncompliance is measured, second, the likelihood that the result was affected by the noncompliance, and third, which party, in supporting or opposing a motion for a new trial, should bear the burden of disproving the presumption, either the present presumption in favor of finality and upholding the judg-

ment, or my proposed presumption in favor of a new trial on the basis of relevant substantial discovery noncompliance. In my view, creating a presumption that discovery noncompliance was material to the issues at trial and placing the burden on the noncompliant party to marshal arguments in favor of upholding the result of the trial, rather than placing the onus on the innocent movant who may have been denied a full and fair proceeding to show a reasonable probability of success at a hypothetical new trial, does not undermine the interests in favor of finality or the repose of judgments. To the extent that the framework that I propose is contrary to these considerations, the importance of assuring disappointed litigants that an unfavorable verdict results from a full and fair trial wherein all of the material information was disclosed, evidence produced and facts and witnesses marshaled, should trump our normal deference to finality when substantial discovery noncompliance has occurred.

Third, I disagree that adopting a rule other than the one established in *Varley*, and modified today, will "invite endless litigation and deplete judicial resources," an assertion essentially making a "floodgates" claim. If we balance, on the one hand, the right of any party to full disclosure and production, which is essential to ensuring a fair trial, versus, on the other hand, the claim that expresses fear that a new rule will lead to numerous motions for a new trial on the basis of discovery noncompliance, the right of a party to full disclosure and a fair trial must, in my opinion, prevail. Indeed, because a motion for a new trial must be filed within ten days in the absence of an extension for good cause; Practice Book § 16-35; the likelihood that the innocent party will discover the noncompliance on the part of the wrongdoer within that time period is remote. To the extent that the framework I propose may result in the filing and granting of additional motions for a new trial, this result should be welcomed as the proper outcome, in that justice is served when a verdict tainted by the nonmoving party's substantial noncompliance is purged and that party is required to bear "the difficulties created by the absence of evidence" resulting from its noncompliance. *Anderson* v. *Cryovac, Inc.*, supra, 862 F.2d 925. Moreover, although the standard I set forth creates a presumption in favor of the movant as the innocent party, the framework still places an onus on the movant to demonstrate that the undisclosed or unproduced evidence was both substantially noncompliant to its discovery requests and relevant to the trier of fact's ultimate determination. Once the innocent party has made this prima facie showing to the satisfaction of the trial court and the presumption of materiality is established, the nonmoving party then has the opportunity to rebut this presumption by demonstrating that the evidence, although responsive, was not material to the case if it had been disclosed or produced, by

establishing that there is no reasonable possibility that the result of the trial could have been different. I therefore reject the notion that replacing the *Varley* test, in its entirety, will result in the opening of the floodgates to improper motions for a new trial.

Fourth, I reject the claim that no standard other than that set forth by the majority is proper because, "[g]iven the breadth of discovery in modern trial practice, it is inevitable that the movant could find some fault with the other party's compliance with broadly phased discovery requests," and because requiring the nonmoving party to prove that its noncompliance was not material "would impose an insupportable burden on [that] party to disprove amorphous assertions . . . ." Although I disagree that in modern discovery practice it is "inevitable" that fault can be found, even if such a fact were true, that inevitability should not excuse either the noncompliant party's conduct or its failure to abide by our rules of practice governing compliance with discovery requests. Indeed, a rule stating otherwise would reward such practices during discovery in the hope that, following an unfavorable verdict, the innocent party would be unable to demonstrate precisely that there was a "reasonable probability . . . that the result of a new trial will be different." Such an outcome would seem to grant the noncompliant party two bites at the apple—once during trial and once during the movant's motion for a new trial—as an incentive to reward the noncompliance.

Additionally, under the framework that I propose, the burden placed on the noncompliant party is far from "insupportable," and that party would not be required to disprove "amorphous" assertions.[14] Instead, the movant would first be required to demonstrate specifically how the undisclosed or unproduced information was substantially nonresponsive to its discovery requests, and also must establish that such material was relevant to the trial court's ultimate determination. The requirement that the noncompliance be substantial, in my view, responds to the majority's concerns that in view of modern trial practice's "broadly phrased discovery requests," it is inevitable that some items will be missed in discovery. The noncompliant party could disagree by seeking to demonstrate that the undisclosed or unproduced information was not requested in the discovery requests, or that the discovery requests were too vague for it to have known that the information produced was not responsive. Further, the noncompliant party could assert that the noncompliance was not substantial. The noncompliant party could also argue that the request was not relevant to the trial court's ultimate determination. It would then fall to the trial court to determine whether, in fact, the movant's claim was true that the undisclosed or unproduced information should have been produced, or whether the noncompliant party successfully demonstrated that the

production was substantially responsive to the discovery requests, or that the requests themselves were too vague. I therefore disagree with the notion that any test, other than that set forth by the majority, is unworkable because of the "breadth of discovery in modern trial practice," or that it would place an insupportable burden on the noncompliant party.[15] I believe that the test that I propose comports with the Practice Book in that the Practice Book: first, does not require intentional misconduct for the imposition of sanctions; and second, requires a failure to comply substantially with any discovery order made pursuant to §§ 13-6 through 13-11 to impose sanctions. See Practice Book § 13-14.[16]

In light of the fact that I would substitute the aforementioned framework for the existing test set forth in *Varley*, I would remand the case to the Appellate Court with direction to remand the case to the trial court in order to permit the parties to present additional arguments before that court tailored to this new standard. See *State* v. *Winot*, 294 Conn. 753, 762 n.7, 988 A.2d 188 (2010) (noting that cases appealed subsequent to prior decision of this court establishing new rule required reversal and remand for new trials in order to have correct instruction read to jury and to permit party opportunity to present evidence and arguments under new rule). Specifically, a remand in this case is proper because the framework I propose sets forth a threshold burden on the movant to create a presumption that the undisclosed or unproduced information was material to the issues at trial, and places a burden on the noncompliant party to rebut that presumption.[17] A remand would allow the trial court to review the parties' new arguments and to reconsider the plaintiff's motion for a new trial under the aforementioned framework.

For all of the foregoing reasons, I would reverse the judgment of the Appellate Court and remand the case to that court with direction to remand the case to the trial court for further proceedings in accordance with the aforementioned framework.

I therefore respectfully dissent.

[1] The plaintiff's discovery requests stated that "personnel file" was to be defined pursuant to General Statutes § 31-128a, which provides in relevant part: "(5) 'Personnel file' means papers, documents and reports, including electronic mail and facsimiles, pertaining to a particular employee that are used or have been used by an employer to determine such employee's eligibility for employment, promotion, additional compensation, transfer, termination, disciplinary or other adverse personnel action including employee evaluations or reports relating to such employee's character, credit and work habits. 'Personnel file' does not mean stock option or management bonus plan records, medical records, letters of reference or recommendations from third parties including former employers, materials that are used by the employer to plan for future operations, information contained in separately maintained security files, test information, the disclosure of which would invalidate the test, or documents which are being developed or prepared for use in civil, criminal or grievance procedures . . . ."

[2] In determining whether to grant the plaintiff's motion, the trial court relied on the test set forth in *Teamsters, Chauffeurs, Warehousemen & Helpers Union, Local 59* v. *Superline Transportation Co.*, 953 F.2d 17, 21 (1st Cir. 1992), pursuant to which the movant "must at least establish that

it possesses a potentially meritorious claim or defense which, if proven, will bring success in its wake."

[3] Practice Book § 16-35 provides in relevant part: "[M]otions for new trials . . . must be filed with the clerk within ten days after the day the verdict is accepted; provided that for good cause the judicial authority may extend this time. The clerk shall notify the trial judge of such filing. Such motions shall state the specific grounds upon which counsel relies."

[4] Practice Book § 13-14 (b) provides in relevant part that such orders may include: "(1) The entry of a nonsuit or default against the party failing to comply;

"(2) The award to the discovering party of the costs of the motion, including a reasonable attorney's fee;

"(3) The entry of an order that the matters regarding which the discovery was sought or other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

"(4) The entry of an order prohibiting the party who has failed to comply from introducing designated matters in evidence;

"(5) If the party failing to comply is the plaintiff, the entry of a judgment of dismissal."

[5] I note that Practice Book § 13-14 has a new subsection (d), effective January 1, 2012, which provides: "The failure to comply as described in this section shall be excused and the judicial authority may not impose sanctions on a party for failure to provide information, including electronically stored information, lost as the result of the routine, good-faith operation of a system or process in the absence of a showing of intentional actions designed to avoid known preservation obligations." Obviously, the rule I propose does not apply to any failure to provide information excused under this new subsection.

[6] Under *Varley*, relief, such as in the form of a new trial, "will only be granted if the unsuccessful party is not barred by any of the following restrictions: (1) There must have been no laches or unreasonable delay by the injured party after the fraud was discovered. (2) There must have been diligence in the original action, that is, diligence in trying to discover and expose the fraud. (3) There must be clear proof of the perjury or fraud. (4) There must be a substantial likelihood that the result of the new trial will be different." *Varley* v. *Varley*, supra, 180 Conn. 4. Within the context of marital dissolution, this court has abandoned the second requirement. See *Billington* v. *Billington*, 220 Conn. 212, 218, 595 A.2d 1377 (1991).

[7] The test set forth in *Varley* also applies to newly discovered evidence. I would retain the test insofar as it applies to newly discovered evidence, since that issue is not before us at this time.

[8] I agree with the majority that we should not adopt the rule set forth in *Anderson*. Although I agree with part of the test in *Anderson*, I disagree with its requirement that parties must show deliberate misconduct by clear and convincing evidence. In this regard, I believe that *Anderson* sets too high a burden for an innocent party.

[9] I note that the *Ramin* case was specifically limited on its facts to family cases. *Ramin* v. *Ramin*, supra, 281 Conn. 349. I cite the case, however, for the philosophical principle that the burden to show immateriality should be placed on the wrongdoer, a position that this court has endorsed in certain circumstances over the past several years. I would extend this policy to all civil cases.

The rules of practice on disclosure apply equally to both civil and family matters. Practice Book § 25-31 provides: "The provisions of Sections 13-1 through13-11 inclusive, 13-13 through 13-16 inclusive, and 13-17 through 13-32 of the rules of practice inclusive, shall apply to family matters as defined in Section 25-1." All of the aforementioned sections refer to the disclosure procedures in civil matters. I also note that Practice Book § 13-14, which deals with sanctions for nondisclosure, is also incorporated in Practice Book § 25-31 of the family discovery section.

I note that although the majority emphasizes the role in our *Ramin* decision of the "heightened duty to disclose in marital cases," the issues of what makes a party a wrongdoer, and whether the wrongdoer or innocent party bears the burden of showing immateriality, are entirely distinct. The question that I pose to the majority is, if the rules of practice apply equally to both civil and family matters, why should our test regarding the burdens of discovery noncompliance be different? I note further that in *Ramin* the plaintiff filed a motion in limine seeking sanctions pursuant to Practice Book § 13-14, which is contained in the civil section. I fail to see, as the

majority suggests, that the extraction of "general jurisprudential principles from *Ramin* can result only in a misapplication of our law." See footnote 19 of the majority opinion. Although the majority does not explain this conclusion, I would maintain that the general jurisprudential principles in *Ramin* are sound. Although contained in our case law, the Practice Book does not promulgate a higher standard of disclosure in family as opposed to civil matters. I would suggest that all counsel, practicing in any area of the law, have a duty to comply with our rules of practice and provide the other side with full disclosure.

I also dispute the majority's contention that it is relevant that, "[u]nlike civil litigants who stand at arm's length from one another, marital litigants have a duty of full and frank disclosure analogous to the relationship of fiduciary to beneficiary . . . ." (Internal quotation marks omitted.) Our holding in *Ramin* that a special duty of "full and frank mutual disclosure" may arise out of the marital relationship may be correct; *Ramin* v. *Ramin*, supra, 281 Conn. 349; but it is irrelevant to the fact that all civil litigants have a duty of full disclosure arising out of our policy, expressed in our rules of practice, mandating full and accurate disclosure and production of materials requested during discovery as an essential component of a fair trial. Full disclosure may or may not be frank, but the claim in the present case is that the defendant did not provide full disclosure.

Likewise, the role of independence of interests implied by the majority's embrace of the "arm's length" aspect of civil litigation in contrast to marital litigation, is a red herring. This aspect of our holding in *Ramin* is relevant to a marital litigant's duty of frankness of disclosure—not fullness—in the discovery process, and therefore goes to determination of when discovery noncompliance occurs in the marital litigation context. The choice of which party bears the burden of noncompliance is unrelated, and is based on our reasoning that it would be "grossly unfair" to require the victim of discovery misconduct to have the burden of proving harm.

The majority suggests that my "analogy of the present case to the interests at issue in spoliation cases conflates intentional destruction of evidence with mere nondisclosure, harms that differ vastly in nature and related policy concerns. Like subornation of perjury, not only is the nature of the harm different, but the nature of the act itself is more egregious." See footnote 18 of the majority opinion. This reasoning is similar to the majority's opinion that *Ramin* presents a unique set of facts upon which to carve an exception. While I agree that intentional spoliation is more egregious than negligent nondisclosure, it may be the equivalent of intentional nondisclosure. I am of the opinion, however, that the failure to comply with our discovery rules, whether intentional, negligent or accidental, has a similar impact on the innocent party's opportunity for a fair trial, and therefore warrants the burden shifting approach. The egregiousness of the act implicates the separate but related issue of attorney discipline. It is too difficult for the innocent party to prove fraud or intentional misconduct, and it is a bizarre standard to set when the impact on the innocent party's opportunity for a fair trial has no necessary connection with the mens rea underlying the discovery noncompliance. The more appropriate standard, in my view, is substantial noncompliance of relevant material under the test which I propose.

The majority further suggests that our holding in *Ramin* is narrower than I suggest because it involved a trial court's error in refusing to hear a motion duly filed. In my view, the problem with embracing general jurisprudential principles in the context of "exceptional circumstances" only is that they do not provide any real guidance to Superior Court judges regarding when the burden shifting will occur. For instance, we know that burden shifting occurs for the intentional spoliation of evidence. When, however, does nondisclosure occur in the family setting? Is it only when a court refuses to hear a motion duly filed? Does it only occur when a party is required to file five motions for contempt based upon discovery noncompliance? Does it occur when individual judges find that the acts are egregious? I propose a new rule because I believe that it both promotes compliance with our Practice Book and supports the principle of fairness that is inherent in our rules of practice. I believe that it also provides the necessary guidance to the trial court regarding both the time and the manner in which the rule should be followed.

Further, this court has suggested potential burden shifting, albeit in dicta, in other types of cases. Thus, in *Burger & Burger, Inc.* v. *Murren*, 202 Conn. 660, 668, 522 A.2d 812 (1987), which involved a potential error in the disqualification of an attorney, we stated that "[a]lthough we decline to set

forth at this time the standard of review in an appeal from a final judgment where error is claimed in the granting of a disqualification order, we do recognize the problems inherent in requiring a litigant to establish prejudice on appeal. Demonstrating that the outcome of a trial has been affected by an erroneous disqualification of counsel rather than by the other myriad variables present in civil litigation concededly would impose a difficult burden on a losing litigant. . . . This factor, coupled with the fact that the right to counsel of one's choice, although not absolute, is a fundamental premise of our adversary system . . . may well require us to place the burden of disproving prejudice on the party who has been advantaged by an erroneous disqualification." (Citations omitted; internal quotations marks omitted.) Likewise, once the threshold burden has been met by the movant, I propose to place the burden of rebuttal on the party advantaged by the noncompliance. I have suggested the aforesaid test because I believe that our rules become weakened and, at times, meaningless, unless there are consequences for noncompliance. Although the majority suggests, appropriately, that the Practice Book provides for sanctions in the event of noncompliance, I maintain that our test for a new trial should conform to the rules of practice to provide additional elements of both consistency and enforcement power to the rules of practice.

[10] Practice Book § 13-7 (a) provides that a party's answers to interrogatories "shall be answered under oath," and in the present case the defendant swore that its responses to the plaintiff's interrogatories and requests for production were, to the best of its knowledge and belief, "true, accurate and complete . . . ."

[11] I note that the majority opinion does not contain a complete quotation of the test set forth in *Bagley* for when a defendant will receive a new trial on the basis of a violation of his *Brady* right. Although the test references whether the result of the trial would have been different, the focus of the test is whether the evidence that the prosecution failed to disclose was *material*. The full formulation of the test is as follows: "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States* v. *Bagley*, supra, 473 U.S. 682.

[12] I note that, similar to the framework that I propose, the test governing whether a defendant is entitled to a new trial on the basis of a prosecutor's nondisclosure of material evidence applies regardless of whether the failure to disclose was intentional or merely negligent. See *United States* v. *Bagley*, supra, 473 U.S. 682 (test "sufficiently flexible to cover the 'no request,' 'general request,' and 'specific request' cases").

[13] Relevant differences between criminal and civil cases are myriad. At a minimum, the following three differences are relevant to our policy considerations: (1) the prosecutor in a criminal case must prove guilt beyond a reasonable doubt, while the plaintiff in a civil case must establish her claim by a preponderance of the evidence; (2) the defendant in a criminal case may have liberty at stake, while the defendant in a civil case risks only the loss of property, a lesser interest; (3) a prevailing plaintiff in a civil case may be aggrieved by discovery noncompliance where the recovery is less than it might otherwise have been, while a prevailing criminal defendant, found not guilty, could not be so aggrieved.

[14] The focus of the majority's new test on the potential impact of remedying the discovery noncompliance at a new trial belies its concern for the burdened party's difficulty in disproving "amorphous" assertions. Whatever the challenges of evaluating the impact of a discovery violation on a past proceeding, the prognostication of a different result at a new trial is unavoidably additionally complicated by the unpredictability of any new jury and any revised trial strategy of both parties, but particularly that of the party disappointed with its results in the first trial. In the context of any close case, who is to say that there does not exist a reasonable probability of a different result at any new trial?

This concern is further belied by the majority's claim that the framework that I propose would only affect the result in the "rare case" where "the fact finder, after weighing the evidence, finds its mind in perfect equipoise." (Internal quotation marks omitted.) See footnote 11 of the majority opinion. Either the burdened party faces difficulty disproving an "amorphous" assertion that there is a reasonable probability or possibility that discovery noncompliance did or did not, could or could not, or will or will not, affect the result at the past or future trial, or the evidence is easily presented and weighed by a fact finder capable of discerning "perfect equipoise." The majority claims to have it both ways.

[15] I note that attorneys have the right to object to discovery requests considered vague or confusing. See Practice Book §§ 13-8 and 13-10 (b). If the parties cannot agree as to the merits of the objection, the trial court can determine, in the first instance, the appropriateness of the request. Practice Book § 13-10 (c).

[16] I note that the majority has cited certain provisions of the rules of practice as a suggestion that its standard does not invite noncompliance. I believe, however, that the standard that I have proposed is more likely to encourage a more consistent approach to the remedies for discovery noncompliance in line with the intent of the rules of practice.

[17] Although the trial court concluded that the anonymous note would not have resulted in a different outcome and that the two undisclosed complaints were cumulative, the trial court made these conclusions and the predicate findings pursuant to *Varley*, under which the plaintiff bore the burden of demonstrating a substantial likelihood that the result of the new trial would be different. The framework that I propose, by reducing the threshold burden on the movant and creating a presumption of materiality once that threshold burden is met, thus creating a burden to rebut for the noncompliant party, changes the trial court's considerations and, in a close case, these new considerations could weigh in favor of granting the motion for a new trial. The trial court itself found that "[t]here is no question that [the Osten and Jackson complaints] were germane to the case and requested in discovery. There is also no question that none of these documents were produced by the defendant, although they should have been. Certainly the details of the complaints could have been used to test the credibility of [Valade and Kelley] at trial."

I also note that the trial court held that the items were "merely cumulative to other evidence introduced at trial and would not have produced a different result." Although the court engaged in some discussion regarding the note and the Osten investigation, there was no discussion regarding the Jackson complaint, other than the conclusory statement that it was cumulative. We are left to speculate why it was cumulative. The fact that, after the note was produced, the plaintiff "was granted a recess to consider what actions to take," contrary to the majority's position, in my view, is of little consequence. In my opinion, the important point is that had these documents been produced in the normal course, as they should have been, the plaintiff could have performed more discovery, taken depositions, and potentially prepared her trial strategy in a different manner. This opportunity was lost by the defendant's noncompliance. In my view, this court, through the use of the test it employs, should not countenance such neglect when it affects the ability of one party to receive a full and fair trial on the merits. Accordingly, I am disinclined to apply the majority's framework to the existing record and the trial court's memorandum of decision. I note, however, that the framework that I propose would be amenable to appellate application as a matter of law in future appeals wherein an appellate court was called upon to review a trial court's decision under the framework.