PALMER, J., concurring. I agree with the majority that the trial court properly granted the pretrial motion of the defendants, John Wayne Fox and Curtis, Brinckerhoff and Barrett, P.C., for judgment in their favor[1] because the plaintiff, Robert Grimm,[2] failed to disclose an expert witness to support his claim of legal malpractice. I therefore also agree with the majority that the judgment of the trial court should be affirmed. In contrast to the majority, however, which concludes that expert testimony was necessary to establish that the defendants' representation of the plaintiff violated the applicable standard of care, I would reject the plaintiff's appeal on the alternative ground that expert testimony was necessary to establish that the defendants' alleged breach of the standard of care was the proximate cause of the damages that the plaintiff allegedly sustained.[3] I would resolve this appeal on that alternative ground because it is beyond dispute that the plaintiff was required to adduce expert testimony on the issue of proximate cause;[4] whether such testimony was necessary to establish a breach of the standard of care is a far closer and, therefore, more difficult question.

The plaintiff's claim stems from the allegedly negligent manner in which the defendants handled certain aspects of his marital dissolution case, in particular, his appeal from the judgment of the trial court to the Appellate Court. See *Grimm* v. *Grimm*, 82 Conn. App. 41, 844 A.2d 855 (2004), rev'd in part, 276 Conn. 377, 886 A.2d 391 (2005), cert. denied, 547 U.S. 1148, 126 S. Ct. 2296, 164 L. Ed. 2d 815 (2006). Although the litigation that spawned the present case is both factually and procedurally tortuous; see *Grimm* v. *Grimm*, supra, 276 Conn. 379, 386 (characterizing parties' litigation as "procedurally dysfunctional" and "involving an unnecessarily complicated and voluminous record"); the factual and procedural background relevant to the plaintiff's claim is relatively straightforward. Beginning in 1998, the defendants served as local counsel to the plaintiff in the trial court proceedings that, in January, 2003, culminated in a judgment dissolving the plaintiff's marriage to his former wife. As part of that judgment, the trial court made a number of findings and issued various financial orders. Among the court's factual findings was its determination that the plaintiff wrongfully had reduced the value of the marital estate by $2.9 million.[5] See *Grimm* v. *Grimm*, supra, 82 Conn. App. 51. The trial court also ordered the plaintiff to pay $100,000 of the attorney's fees that his former wife had incurred. Id., 53–54.

Following the dissolution judgment, the plaintiff retained the defendants to represent him in his appeal to the Appellate Court. In that appeal, the plaintiff claimed,

inter alia, that the trial court's finding that he had unjustly diminished the marital estate by $2.9 million was clearly erroneous. See id., 51. The Appellate Court agreed with the plaintiff but concluded that the erroneous finding was harmless.[6] Id., 52–53. The Appellate Court also concluded that the trial court had abused its discretion in ordering the plaintiff to pay $100,000 of his former wife's attorney's fees. Id., 55.

Thereafter, we granted the plaintiff's petition for certification to appeal, limited to the issue of whether the Appellate Court properly had concluded that the trial court's improper finding with respect to the $2.9 million reduction of the marital estate was harmless. *Grimm* v. *Grimm*, 270 Conn. 902, 903, 853 A.2d 519 (2004). We also granted his former wife's conditional cross petition for certification to appeal, limited to the issue of whether the Appellate Court properly had reversed the award of attorney's fees. *Grimm* v. *Grimm*, 270 Conn. 903, 853 A.2d 519 (2004). With respect to the plaintiff's appeal, we concluded that the plaintiff had abandoned his claim concerning the $2.9 million reduction in the marital estate because (1) he did not file a motion for an articulation or rectification of the trial court's factual findings on that issue, and (2) the claim was not raised until oral argument before the Appellate Court, in part because the briefing of that claim was both inadequate and set forth in the wrong section of his Appellate Court brief. *Grimm* v. *Grimm*, supra, 276 Conn. 386–87, 390–91 and n.14. The defendants continued to represent the plaintiff throughout the pendency of his appeal to this court.

The plaintiff subsequently commenced the present legal malpractice action. Although not artfully drawn, the plaintiff's pro se complaint alleges, in essence, that the defendants were negligent in their representation of the plaintiff in the Appellate Court because their efforts to challenge the propriety of the trial court's finding that the plaintiff wrongfully had diminished the marital estate by $2.9 million fell below the applicable standard of care.[7] In support of his claim of negligence, the plaintiff relies exclusively on certain statements in this court's opinion in *Grimm* v. *Grimm*, supra, 276 Conn. 377, in which we declined to review the plaintiff's contention that the Appellate Court improperly had concluded that the trial court's improper finding concerning the $2.9 million diminution of the marital estate was harmless.

Specifically, the plaintiff notes that, in *Grimm* v. *Grimm*, supra, 276 Conn. 377, we determined that he was not entitled to review of his claim concerning the $2.9 million because of what we characterized as "two separate, but related, breakdowns of basic appellate procedure" that had rendered the claim "incapable of meaningful evaluation by any reviewing court." Id., 386. We observed that the "first procedural shortfall" was

the plaintiff's "failure to move for articulation or rectification of the underpinnings of the trial court's factual findings in a case involving an unnecessarily complicated and voluminous record." Id. With respect to this procedural default, we explained that the plaintiff bore the burden of seeking such an articulation or rectification because "without [an] . . . articulation or rectification, there [was] no way short of a crystal ball for a reviewing court to ascertain the precise basis for the trial court's decision in this voluminous record." Id., 389. We further stated that "[a]n articulation or rectification by the trial court would have, at the very least, aided the reviewing courts in determining the basis or lack thereof in the record for the trial court's decision . . . and also would have afforded the trial court, as the finder of fact, the opportunity to correct any miscalculations." Id. Thus, we made it clear that (1) the plaintiff was required to file a motion for articulation or rectification, (2) the requirement to do so was a basic one, (3) without a motion for articulation or rectification, the plaintiff's claim was unreviewable, and (4) if the plaintiff had filed the motion, he would have obtained appellate review of his claim.

We then explained that, even if the plaintiff had provided the court with an adequate record, his claim concerning the $2.9 million diminution of the marital estate was unreviewable because he had abandoned the claim. We reached this conclusion for two reasons, the first of which was that he had not adequately raised the claim in the Appellate Court. In fact, we observed that "[t]he only mention of the $2.9 million in the [plaintiff's] Appellate Court brief is contained not in the *argument* section . . . but . . . in the *nature of proceedings and statement of facts*." (Emphasis in original.) Id., 390–91. We then observed that the limited discussion of the issue in the statement of facts was inadequate; see id., 390–93 and n.14; and, in addition, that "it violently disregard[ed] . . . the rule [of practice] governing the organization of appellate briefs." Id., 391 n.14. Finally, we explained that the plaintiff had abandoned his claim for a second reason, namely, because such a claim was not raised until oral argument before the Appellate Court. Id., 393. We further explained that it is well established that a reviewing court will not consider a claim first made at oral argument, and, therefore, the Appellate Court should not have considered the plaintiff's claim. Id.

Thus, as we stated in summarizing our reasons for declining to address the merits of the plaintiff's claim on appeal to this court, "the [plaintiff's claim] with respect to the $2.9 million [was] both abandoned and rendered unreviewable by his failure to follow certain basic principles of appellate procedure." Id., 382. Moreover, our detailed explanation as to why the plaintiff was not entitled to this court's review of his claim makes it clear that he would have received such review if the

defendants had performed in the manner expected—indeed, required—of attorneys appearing before the Appellate Court and this court. See generally id., 386–94.

Under the circumstances, expert testimony may not have been required to make out a prima facie case that the defendants' representation of the plaintiff on appeal fell below the applicable standard of care.[8] "Malpractice is commonly defined as the failure of one rendering professional services to exercise that degree of skill and learning commonly applied under all the circumstances in the community by the average prudent reputable member of the profession with the result of injury, loss, or damage to the recipient of those services . . . ."[9] (Internal quotation marks omitted.) *Updike, Kelly & Spellacy, P.C.* v. *Beckett*, 269 Conn. 613, 649, 850 A.2d 145 (2004). Thus, "[t]he general rule is that [when an attorney's] exercise of proper professional skill and care is in issue, expert testimony tending to establish the want of such skill and care is essential to recovery. . . . The rationale underlying that rule is that in most cases, the determination of an attorney's standard of care, which depends on the particular circumstances of the attorney's representation, is beyond the experience of the average layperson, including members of the jury and perhaps even the presiding judge." (Citation omitted; internal quotation marks omitted.) *Celentano* v. *Grudberg*, 76 Conn. App. 119, 126, 818 A.2d 841, cert. denied, 264 Conn. 904, 823 A.2d 1220 (2003). Although expert evidence is required in most cases, it is not always necessary. E.g., *St. Onge, Stewart, Johnson & Reens, LLC* v. *Media Group, Inc.*, 84 Conn. App. 88, 95, 851 A.2d 1242, cert. denied, 271 Conn. 918, 859 A.2d 570 (2004). In particular, the general rule requiring expert testimony does not apply to cases in which "there is present such an obvious and gross want of care and skill that the neglect is clear even to a layperson." (Internal quotation marks omitted.) *Davis* v. *Margolis*, 215 Conn. 408, 416 n.6, 576 A.2d 489 (1990). In such cases, the evidence is deemed "sufficiently transparent to obviate the need for the testimony of experts." *St. Onge, Stewart, Johnson & Reens, LLC* v. *Media Group, Inc.*, supra, 96; see also id., 95–96 (explaining that this "flexible approach to jury competence to make reasoned decisions about legal performance has worked well in legal malpractice cases"). This court's discussion in *Grimm* v. *Grimm*, supra, 276 Conn. 382, 386, in which we explained that the defendants' violation of several "basic" rules of appellate procedure had resulted in our refusal to entertain the plaintiff's claim concerning the $2.9 million diminution of the marital estate may well be sufficient to obviate the need for expert testimony on the issue of negligence.[10] Of course, in that case, we had no occasion to speak in terms of the standard of care because that specific issue was not before the court. Nevertheless, our determination that the defendants had violated cer-

tain basic rules of appellate procedure and that we would have entertained the plaintiff's claim but for those violations, may be adequate, without more, to support the conclusion that the defendants' representation of the plaintiff with respect to that claim was not acceptable under any fair standard of reasonableness. Indeed, it is difficult to see how a juror with knowledge of our analysis and conclusion in *Grimm* v. *Grimm*, supra, 276 Conn. 377, could reach any other result, at least without countervailing evidence from the defendants, because an attorney's failure to follow basic rules of appellate procedure relative to a claim that the attorney believed to be meritorious also constitutes a failure to meet minimal standards of appellate advocacy. This is especially true with respect to the defendants' failure to assert their claim in the proper section of the Appellate Court brief.

The majority asserts, however, that, although in *Grimm* v. *Grimm*, supra, 276 Conn. 377, we "expressed our dissatisfaction with the state of the record and the briefing of the issues" in language that was "critical in tone and content . . . [w]e did not, nor could we, on the basis of the record before us, opine as to the reasonableness of the defendants' strategic process or their ultimate decisions throughout the litigation of that case." The majority further states that "our observation that the defendants had provided [the Appellate Court and] this court with an inadequate record and inadequately briefed issues . . . does not, standing alone, indicate that those failures were necessarily the result of professional negligence by the defendants." These assertions ignore the fact that we *also* stated in *Grimm* v. *Grimm*, supra, 276 Conn. 382, 386, that the defendants had violated several basic rules of appellate procedure. That observation is critical. Although attorney negligence might not be the only possible explanation for an inadequacy in the record or briefing in other cases, in *Grimm* v. *Grimm*, supra, 276 Conn. 377, this court expressly attributed those failings to the fact that the defendants had violated certain rudimentary procedural rules.[11] The majority does not persuasively explain how the defendants' failure to follow basic rules of appellate procedure reasonably could be attributed to their "strategic process or their ultimate decisions throughout the litigation of [the] case."[12]

For this reason, the majority's reliance on *Dixon* v. *Bromson & Reiner*, 95 Conn. App. 294, 298–99, 898 A.2d 193 (2006), a legal malpractice case, is misplaced. The majority finds support in *Dixon* for the proposition that "an observation by [the court] . . . that evidence was not produced to support a contention does not mean that the failure to produce that evidence was the result of professional negligence by . . . counsel." (Internal quotation marks omitted.) In *Dixon*, however, there was nothing to suggest that counsel's failure to provide a record adequate to support a particular contention

was the product of counsel's negligence. By contrast, in *Grimm* v. *Grimm*, supra, 276 Conn. 377, this court declined to review the plaintiff's claim because the defendants had failed to follow certain basic rules of appellate procedure. The other cases cited by the majority for the same principle are similarly inapposite because they, like *Dixon*, also do not involve a situation in which this court—or, for that matter, any other court—indicated that counsel's failure or omission was the result of a violation of the rules of procedure or some other neglect. See, e.g., *Byrne* v. *Grasso*, 118 Conn. App. 444, 449–50, 985 A.2d 1064 (2009) (client alleging legal malpractice by former attorney could not establish attorney's negligence without expert testimony when record did not establish that counsel's failure to take certain action was due to neglect or other impropriety), cert. denied, 294 Conn. 934, 987 A.2d 1028 (2010); *Moore* v. *Crone*, 114 Conn. App. 443, 447–48, 970 A.2d 757 (2009) (same); *Pagan* v. *Gonzalez*, 113 Conn. App. 135, 138 n.4, 140–41, 965 A.2d 582 (2009) (same).[13]

I also disagree with the majority's statement, quoted verbatim from the opinion of the Appellate Court in *Pagan* v. *Gonzalez*, supra, 113 Conn. App. 141, that "[t]he exception to the expert testimony requirement [in a legal malpractice case] . . . is limited to situations in which the . . . attorney essentially has done nothing whatsoever to represent his or her client's interests . . . ." (Internal quotation marks omitted.) Like the court in *Pagan*, the majority fails to explain the logic of this assertion, and I am unable to discern any such logic. In fact, it is perfectly possible that an attorney who has represented a client competently over a period of time might thereafter engage in professional misconduct that so clearly falls below the standard of care that a juror readily would recognize the inadequacy of the attorney's performance. Although, in such circumstances, it cannot be said that the attorney *essentially did nothing whatsoever* on behalf of the client, no expert testimony would be necessary to establish the attorney's negligence.[14] In the present case, this court's characterization of the defendants' representation of the plaintiff on appeal as violating several basic rules of appellate procedure arguably was sufficient to establish a prima facie case of negligence, even though there is no claim that the defendants did "nothing whatsoever" to represent the plaintiff's interests or that their performance otherwise was deficient "throughout" the lengthy trial and appeal of the case.

For the foregoing reasons, I would not reach the issue of whether the defendants were negligent in their representation of the plaintiff on appeal. Rather, I would decide this case on the basis of the defendants' alternative ground for affirmance, namely, that the plaintiff was required to present expert testimony to establish that the defendants' negligence was the proximate

cause of the damages that he has alleged. As this court previously has observed, "[i]n legal malpractice actions, the plaintiff typically proves that the defendant attorney's professional negligence caused injury . . . by presenting evidence of what would have happened in the underlying action had the defendant not been negligent. This traditional method of presenting the merits of the underlying action is often called the case-within-a-case. 5 R. Mallen & J. Smith, Legal Malpractice (5th Ed. 2000) § 33.8, pp. 69–70." (Internal quotation marks omitted.) *Margolin* v. *Kleban & Samor, P.C.*, 275 Conn. 765, 775 n.9, 882 A.2d 653 (2005). Thus, to prevail on his claim against the defendants, the plaintiff would be required to prove not only that the defendants were negligent in their handling of his appeal, but also that that appeal would have been successful if the defendants had represented him competently. In the absence of such proof, the plaintiff could not establish that his alleged damages—all of which stemmed from the trial court's financial orders—were the result of the defendants' negligence and not from the trial court's reasonable exercise of discretion in entering those orders. Even if we assume that the defendants were negligent in their representation of the plaintiff, it is clear that expert testimony was necessary for a proper resolution of the proximate cause issue because a jury could not possibly be expected to reach a reasoned conclusion about the merits of the plaintiff's appeal without the aid of such testimony. Indeed, as I previously noted, the plaintiff makes no argument as to why expert testimony on causation would not have been necessary, presumably because there simply is no such argument to be made. Accordingly, I would affirm the judgment of the trial court but on this alternative ground. I therefore concur in the result that the majority reaches.

[1] Like the majority, I treat the defendants' pretrial motion for judgment as a motion for summary judgment. See footnote 6 of the majority opinion.

[2] The plaintiff represented himself in the trial court and also represents himself on appeal.

[3] The majority addresses this issue in part I of its opinion. I agree with part II of the majority opinion, in which the majority concludes that the plaintiff cannot prevail on his claim that the trial court improperly granted the defendants' motion for judgment one day after that motion was filed.

[4] Although the plaintiff asserts in conclusory fashion that expert testimony was not necessary to prove causation, he provides no explanation whatsoever to support his contention. As I discuss more fully hereinafter, there is no question that expert testimony is required to establish that the defendants' alleged legal malpractice actually resulted in harm to the plaintiff because no lay juror possibly could be expected to determine whether the plaintiff would have prevailed on his legal claim but for the defendants' alleged negligence in prosecuting the claim.

[5] The plaintiff contends that, because of the nature and magnitude of this finding, it necessarily had a bearing on all of the court's financial orders.

[6] Judge Flynn dissented from this portion of the Appellate Court opinion. See *Grimm* v. *Grimm*, supra, 82 Conn. App. 56–58 (*Flynn, J.*, dissenting). Although Judge Flynn agreed with the Appellate Court majority that the trial court improperly found that the plaintiff wrongfully had diminished the marital estate by $2.9 million, he disagreed that the finding was harmless. Id., 56–57. Accordingly, Judge Flynn would have reversed the portion of the trial court's judgment pertaining to the financial orders and remanded the case for a new hearing on the financial issues. Id., 58.

[7] As this court recently has reiterated, "we should be solicitous to pro se

[parties] and construe their pleadings liberally in light of the limited legal knowledge [that] they possess." (Internal quotation marks omitted.) *Markley* v. *Dept. of Public Utility Control*, 301 Conn. 56, 74, 23 A.3d 668 (2011).

[8] I note, preliminarily, that the present action is not predicated on the contention that the defendants negligently failed to assert a claim—in this case, a claim challenging the trial court's finding with respect to the $2.9 million diminution of the marital estate—that they should have asserted. Rather, the present action involves a scenario in which the claim was raised but not competently pursued. In view of the fact that the defendants raised the claim—presumably because they had decided, in the exercise of their professional judgment, that it was appropriate to do so—the issue presented by this appeal is not whether the claim should have been raised but whether the defendants, having done so, were negligent in failing to pursue it competently. Put differently, by raising the claim, the defendants relieved the plaintiff of the burden of demonstrating that the claim should have been raised; his burden, instead, is to establish that the defendants prosecuted the claim negligently and that he suffered harm by virtue of that negligence.

[9] In general, therefore, "the plaintiff in [a legal] malpractice action must establish: (1) the existence of an attorney-client relationship; (2) the attorney's wrongful act or omission; (3) causation; and (4) damages." (Internal quotation marks omitted.) *Updike, Kelly & Spellacy, P.C.* v. *Beckett*, 269 Conn. 613, 649, 850 A.2d 145 (2004).

[10] Because this court is the ultimate arbiter of such matters, our conclusion in *Grimm* v. *Grimm*, supra, 276 Conn. 382, 386, that basic rules of appellate procedure were violated represents a definitive statement on that issue, and a juror evaluating the defendants' performance on behalf of the plaintiff would be required to accept this court's observation in that regard.

[11] Thus, the majority is incorrect in asserting that I am "essentially stat[ing] that a violation of the rules of practice is negligence per se." Footnote 13 of the majority opinion. As I have explained, the issue that the majority addresses is whether expert testimony is necessary to prove the defendants' negligence under the unusual facts of the present case, facts that include this court's extended discussion and evaluation, in *Grimm* v. *Grimm*, supra, 276 Conn. 377, of the defendants' performance in representing the plaintiff in his appeal to the Appellate Court. In fact, because I would not reach the issue, I need not decide whether the majority is correct in concluding that the plaintiff was required to present expert testimony for the purpose of establishing negligence. I do believe, however, that the question is close enough that this court would be well advised to avoid it and to decide the case on the alternative ground for affirming the trial court's judgment.

[12] I also have difficulty with the majority's assertion insofar as it pertains to the defendants' decisions "throughout the litigation of [the] case" because the plaintiff does not claim that the defendants were negligent in their handling of the plaintiff's case generally. Rather, the plaintiff's legal malpractice action is predicated solely on the defendants' representation of the plaintiff in connection with a particular claim on appeal that, the plaintiff contends, would have resulted in a favorable outcome, saving him hundreds of thousands of dollars, if the defendants had followed the various rules of appellate procedure that we identified in *Grimm* v. *Grimm*, supra, 276 Conn. 377. The plaintiff, however, was required to adduce expert testimony to support his contention that he would have prevailed on that appellate claim, and his failure to do so clearly entitles the defendants to judgment in their favor. That is because, without such expert testimony, the plaintiff cannot establish that the defendants' negligence was a proximate cause of his alleged damages, and not because he necessarily has failed to demonstrate that the defendants were negligent in the manner in which they litigated the claim on appeal.

[13] I note that the majority states that, "[a]lthough [the foregoing cases, namely] *Moore*, *Byrne* and *Pagan* all involved omissions and failures by the attorneys therein, the Appellate Court consistently has required a more significant failure or omission to warrant the application of the exception to the expert testimony requirement in legal malpractice cases." In fact, the requirement of expert testimony is not strictly reserved for cases involving "a more significant failure or omission" than the failures or omissions that occurred in *Moore*, *Byrne* and *Pagan* because, in each of those cases, the reason for the failure or omission never was addressed. If the Appellate Court had concluded in those cases, as this court did in *Grimm* v. *Grimm*, supra, 276 Conn. 377, that the failures or omissions had been due to violations of basic rules of appellate procedure, then expert testimony might not have been necessary to establish negligence.

[14] I note that the same exception to the general rule requiring expert testimony applies in cases involving claims of medical malpractice. See, e.g., *Kalams* v. *Giacchetto*, 268 Conn. 244, 248 n.4, 842 A.2d 1100 (2004) ("[e]xpert [medical] opinion [evidence] may . . . be excused in those cases [in which] the professional negligence is so gross as to be clear even to a lay person" [internal quotation marks omitted]). In those cases, as well, there is no reason for requiring expert medical testimony unless the defendant physician "essentially has done nothing whatsoever" on behalf of his or her patient. Thus, for example, a surgeon who successfully performs surgery on a patient also may leave a foreign object inside the patient's body. In those cases, although the vast majority of the surgeon's work was competent, expert testimony may not be needed to establish the surgeon's negligence in failing to remove the foreign object. See, e.g., *Boone* v. *William W. Backus Hospital*, 272 Conn. 551, 567–68, 864 A.2d 1 (2005) (discussing exceptions to requirement of expert testimony in medical malpractice cases).