I. TREATMENT OF *PRO SE* LITIGANTS IN THE COURTS

A. PLEADING STANDARDS

It is almost universally recognized in both New York State and Federal Court that *pro se* pleadings are construed more liberally than those prepared by attorneys.

1. New York State Cases

a. Pezhman v. City of New York, 29 A.D.3d 164, 168, 812 N.Y.S.2d 14, 18 (1st Dep't 2006) (a "*pro se* complaint should be construed liberally in favor of the pleader).

b. Rosen v. Baum, 164 A.D.2d 809, 811, 559 N.Y.S.2d 541, 542 (1st Dep't 1990) (same).

c. Planck v. SUNY Board of Trustees, 18 A.D.3d 988, 990. 795 N.Y.S.2d 147, 149 (3rd Dep't), *lv. dsmsd.*, 5 N.Y. 3d 844, 805 N.Y.S.2d 595 (2005) (complaint dismissed "even after applying the 'liberal and broad interpretation' to the complaint as is appropriate with a *pro se* litigant).

d. Net Com Data Corp. of New York v. Brunetti, 2010 N.Y. Misc. LEXIS 1436 (Sup. Ct. Nassau Co. 2/4/10) (Driscoll, J.) (answer stating that defendant "does not waive any right to challenge jurisdiction . . . at any point during this proceeding even upon final determination" is "precisely the sort of drafting leniency the law permits for a *pro se* litigant").

2. Federal Cases:

a. Erickson v. Pardus, 551 U.S. 89, 94, 127 S.Ct. 2197 (2007) (*pro se* pleadings "however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers").

b. Bobal v. Rensselear Polytechnic Institute, 916 F.2d 759, 762-63 (2nd Cir. 1990), *cert. denied*, 499 U.S. 943, 111 S.Ct. 1404 (1991). (Attached)

c. Washington v. James, 782 F.2d 1134, 1138 (2nd Cir. 1986) (complaint not to be dismissed unless "frivolous on its face or wholly unsubstantial").

B. LATER STAGES OF THE CASE - While a *pro se* litigant is to be spared "the harsh application of technical rules," he has no greater rights than any other litigant, and is not excused from the procedural requirements impose on all civil litigants. McNeil v. United States, 508 U.S. 106, 113, 113 S.Ct. 1980 (1993); Edwards v. Immigration and Naturalization Service, 59 F.3d 5, 8 (2nd Cir. 1995).

1. DISCOVERY - both in New York State and Federal Court, the Courts generally are willing to use their discretion in favor of *pro se* litigants who fail to comply with discovery orders, as long as the failure to comply was not done willfully or in bad faith. However, in Federal Court, the Court must give notice to the *pro se* litigant that violation of a Court order regarding discovery will result in a dismissal of the case with prejudice.

a. Brown v. Astoria Federal Savings, 51 A.D.3d 961, 858 N.Y.S.2d 793 (2nd Dep't 2008) (*pro se* plaintiff's complaint dismissed where willful and contumacious nature of conduct could be inferred from refusal to submit to deposition, to respond to other discovery demands, failure to attend preliminary conference and inadequate explanations for failure to comply).

b. Kaplan v. KCK Studios, Inc., 238 A.D.2d 264, 657 N.Y.S2d 26 (1st Dep't 1997) (no evidence of a pattern of obstructive or dilatory behavior on *pro se* plaintiff's part where majority of responses to discovery demands were satisfactory, and noncompliance was minimal).

c. Agiwal v. Mid Island Mortgage Corp., 555 F.3d 298 (2nd Cir. 2009).

d. Bobal, *supra*, 916 F.2d at 764. (Attached)

e. Capitol Records, Inc. v. Thomas, 2007 WL 2071553 (E.D.N.Y. 7/16/07) (failure of *pro se* defendant to comply with discovery order not willful when resulted from correspondence being mailed to incorrect address when she moved to Georgia, she indicated willingness to proceed with deposition and she was never warned of the consequences of her actions)

2. SUMMARY JUDGMENT. Although *pro se* litigants are afforded "special solicitude" and his or her submissions will be read liberally where his claims are subject to a final dismissal, the summary judgment standard is no different for a *pro se* litigant than any other. Evidentiary facts in opposition to a motion for summary judgment are generally required, and the *pro se* litigant cannot simply rely upon his or her pleadings. See Melendez v. Haase, 2010 WL 5248627, at p. 6 (S.D.N.Y. 12/15/10); but see Executive Nurses Home Care, Inc. v. Demarco, 2 Misc.3d 226, 767 N.Y.S.2d 199 (Court would consider statements in unsworn letter from defendant forced to act *pro se* when retained counsel could not be contacted). However Rule 56.2 of the Joint Local Civil Rules for the Southern and Eastern Districts of New York (attached) require that any represented party moving for summary judgment against a *pro se* party serve and file a separate document entitled "Notice to *Pro Se* Litigant Who Opposes a Motion for Summary Judgment." Failure to give notice without a clear understanding by the *pro se* litigant of the consequences of failing to comply with Rule 56 will make vacatur of any summary judgment granted "virtually automatic." Irby v. New York City Transit Authority, 262 F.3d 412, 414 (2nd Cir. 2001).

3. TRIAL. As the First Department stated in 2010, "defendant was not entitled to use his *pro se* status to violate rules of evidence and procedure" (People v. Collins, 77 A.D.3d 404, 405, 908 N.Y.S.2d 49). In both New York State and Federal Court, *pro se* litigants must be familiar with and comply with all rules of evidence, and will be held to the same standards of proof as those who are represented by counsel to supply legally competent evidence. Brown v. Ionescu, 2008 WL 123805 (S.D.N.Y. 1/11/08); Duffen v. State, 245 A.D.2d 653, 653-54, 665 N.Y.S.2d 978 (3rd Dep't 1997), *lv. den.*, 91 N.Y.2d 810, 670 N.Y.S.2d 404 (1998) (*pro se* litigant required to present competent expert evidence that absence of medication contributed to his dizzy condition and ultimate fall) (Attached); Sloninski v. Weston, 232 A.D.2d 913, 914, 648

N.Y.S.2d 823, 824-25 (3rd Dep't 1996), *lv. den.*, 89 N.Y.2d 809, 655 N.Y.S.2d 889 (1997) (*pro se* litigant failed to lay a proper foundation of most exhibits, including deed and survey); Roundtree v. Singh, 143 A.D.2d 995, 533 N.Y.S.2d 609 (2nd Dep't 1988) (*pro se* plaintiff's cause of action for loss of use of automobile dismissed after trial where he failed to introduce competent proof of damages for loss of use of vehicle, such as competent expert testimony or documentation of actual rental value of substitute vehicle).

4. REVIEW OF MAGISTRATE'S ORDER. Based upon the language of Fed. R. Civ. Proc. 72(a) and (b), the Second Circuit has enunciated a rule that failure by a *pro se* litigant to object to a Magistrate's order on a dispositive matter does not waive appellate review unless the Magistrate's report explicitly warns of the waiver, but that a similar failure to object on a non-dispositive matter does waive appellate review. Caidor v. Onodaga County, 517 F.3d 601 (2nd Cir. 2008).

C. Other Examples of Court's Protection of *Pro Se* Defendants

1. Velocity Investments, LLC v. McCaffrey, 2011 WL 420661 (Dist. Ct. Nass. Co. 2/2/11) (Hirsh, J.) (Attached). Process Server had been the subject of an action in Supreme Court, Erie County because of false affidavits of service in debt collection cases statewide. Part of consent order settling action provided that letter was to be sent to defendant upon whom service had been made pursuant to CPLR 308(4) requesting that defendant sign "Affidavit and Stipulation" providing, *inter alia*, for vacating of default judgment and allowing plaintiff to re-serve. Although defendant McCaffrey had signed the Affidavit and Stipulation, because he was *pro se* he was not advised of his rights and procedures for vacating the judgment if he did not sign that document and the rights he was waiving by signing it. The Court refused to sign an order "rubber stamping" the "Affidavit and Stipulation", and instead ordered a hearing at which time plaintiff was to produce an assignment of the *pro se* defendant's account to it, a copy of the credit card agreement in effect at the time of the alleged default and copies of the credit card statements establishing the existence of the debt.

2. LR Credit21 LLC v. Paryshkura, ___ Misc.3d ___, 914 N.Y.S.2d 614 (Dist. Ct. Nass. Co. 2010) (Ciaffa, J.) (Attached). *Pro se* defendant allowed to withdraw from proposed "stipulation of payment" in consumer debt case, where she alleged she had been "intimidated" into signing the stipulation. Court believed that plaintiff obtained the settlement by taking undue advantage of *pro se* defendant. At conference scheduled to address the proposed settlement, attorney for plaintiff was unable to provide Court with proof of the alleged assignment of the debt, proof of notice of the assignment or proof of the underlying debt. Claim would proceed on its merits.

II. ETHICAL CONCERNS IN ASSISTING A *PRO SE* LITIGANT

A. PROS AND CONS OF LIMITED SCOPE REPRESENTATION

1. Positive Aspects.

- Allow lawyers to increase the number of clients they can assist
- Provides equal access to justice and fills the gap between people who qualify for free legal services and those unable to afford counsel.
- Makes the judicial system more efficient as the burden is taken off the judges and courts to assist *pro se* litigants.
- Consistent with a lawyer's duty to "seek improvement of the law, the administration of justice, and the quality of service rendered by the legal profession".

2. Negative Aspects.

- Potential for lawyers to be *de facto* acting as litigation counsel without ever having to appear before court or having their identity disclosed, and constitutes a misrepresentation to the Court.
- Unfair to other side for ostensibly *pro se* litigant to have pleadings interpreted liberally where in fact lawyer has rendered extensive assistance, including ghostwriting the pleading.
- Evades Federal Rule 11 and 22 NYCRR Part 130-a duties by having attorney avoid signing the document.

B. NY RULES OF PROFESSIONAL CONDUCT

1. RULE 1.2(C) (Attached)**:** SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER

- "A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances, the client gives informed consent and where necessary notice is provided to the tribunal and/or opposing counsel."

- *Comments:*
  - In General:
    - The scope of services may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client.
    - In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to

accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly.

- Disclosure of Limitations, Consequences:
  - The lawyer must adequately disclose the limitations on the scope of the engagement and the matters that will be excluded.
  - The lawyer must disclose the reasonably foreseeable consequences of the limitation.
- Reasonability Requirement:
  - The limitation of representation must be reasonable under the circumstances.
- Duty to provide competent representation:
  - Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

2. There is no equivalent in the old Disciplinary Rules.

3. New York County Lawyer's Association: Committee on Professional Ethics Opinion 742. April 16, 2010 (attached) recognizes limited scope representation in light of New York Model Rule 1.2©) and appears to generally allow ghostwriting with disclosure in limited circumstances.
http://www.nycla.org/siteFiles/Publications/Publications1348_0.pdf

- Digest of Opinion**:** Limited scope representation "is now ethically permissible for an attorney, with the informed consent of his or client, to play a limited role and prepare pleadings and other submissions for a *pro se* litigant without disclosing the lawyer's participation to the tribunal and adverse counsel**.** Disclosure of the fact that a pleading or submission was prepared by counsel need only be made 'where necessary**'."**

- Interpretation of "where necessary": The committee suggests that disclosure need only be made based upon:
  1. Procedural rule
  2. Court rule
  3. Particular judge's rule
  4. Judge's order in a specific case
  5. Where failure to disclose would result in misrepresentation or would violate a law or attorney's ethical obligations.
  6. In light of older view and lack of clarification from New York Courts since adoption of Model Rules (see below), opinion recommends, absent a more specific rule of court or judge, that lawyer can fulfill any disclosure

obligation with the notation on any papers "Prepared with the assistance of counsel admitted in New York"

4. Older view in New York is that undisclosed representation impermissibly misleads the Court. See N.Y. State Bar Ass'n Comm. On Professional Ethics, Op. 613 (1990); N.Y. City Bar Ass'n Comm. On Professional & Judicial Ethics, Formal Op. 1987-2 (1987).

5. New York courts have yet to interpret Rule 1.2©) and Appellate Divisions have given no clarification as to what "where necessary" means.

C. ABA MODEL RULES OF PROFESSIONAL CONDUCT

1. RULE 1.2©): Scope Of Representation And Allocation Of Authority Between Client And Lawyer. "A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent."

-Does not contain New York Model Rule's language "and where necessary notice is provided to the tribunal and/or opposing counsel."

2. American Bar Association Formal Opinion 07-446. May 5, 2007 **:** "Undisclosed Legal Assistance to *Pro Se* Litigants" (attached)
http://www.americanbar.org/content/dam/aba/migrated/media/youraba/200707/07_446_2007.authcheckdam.pdf

- Legal Assistance Is Not Material**:** The fact that a litigant submitting papers on a *pro se* basis has received legal assistance behind the scenes is not material to the merits of the litigation.
- No Unfair Advantage: Permitting a litigant to file papers that have been prepared with the assistance of counsel without disclosing the nature and extent of such assistance will not secure unwarranted "special treatment" for that litigant or otherwise unfairly prejudice other parties to the proceeding.
    - The tribunal will most likely discern on its own whether an attorney assisted.
    - There is no reasonable concern that a litigant appearing *pro se* will receive an unfair benefit from a tribunal as a result of behind-the-scenes legal assistance.

D. OTHER JURISDICTIONS:

1. Virtually all Federal Courts, including in New York, have severely criticized ghostwriting and any other undisclosed "substantial assistance" to an ostensibly *pro se* litigant for the reasons discussed in the "Negative Aspects" of subsection A above. E.g., See Delso v. Trustees for Plan of Merck & Co, Inc., 2007 WL 766349 (D.N.J. 3/507)

(attached) (Ghostwriting violated the New Jersey Rules of Professional Conduct, ran afoul of the attorney's duty of candor to the court, and contravened the spirit of Fed. R. Civ. P. 11); Duran v. Carris, 238 F.3d 1268 (10th Cir. 2001)("participation by an attorney in drafting an appellate brief is per se substantial, and must be acknowledged by signature"); Laremont Lopez v. Southeastern Tidewater Opportunity Project, 968 F.Supp.1075 (E.D. Va. 1997); Alcoa, Inc. v. ATM, Inc., 2008 WL 511503 (E.D.N.Y. 12/3/08) (substantial conduct behind the scenes in providing legal assistance to a *pro se* litigant without filing a notice of appearance "can constitute a misrepresentation to the court by both litigant and counsel"); Raghavendra v. Trustees of Columbia University, 2008 WL 2696226 (S.D.N.Y. 7/7/08).

2. 2009 California Rules of Court 3.35 and 3.37 allow limited scope representation without disclosure within the text of a document that attorney was involved in preparing the document.

E. SAMPLE LIMITED SCOPE REPRESENTATION AGREEMENTS (from program materials of March 24, 2009 presentation by M. Sue Talia, ABA Standing Committee on the Delivery of Legal Services and Legal Aid Society of Orange County, California entitled "Unbundling 101 - Expanding Your Practice Using Limited Scope Representation) - Attached