VOLS

VOLUNTEERS *of* LEGAL SERVICE

UNEMPLOYED WORKERS PROJECT

TRAINING MANUAL

2024

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Table of Contents

I. THE NEW YORK UNEMPLOYMENT INSURANCE BENEFITS SYSTEM

A. Overview of the Unemployment Insurance System

The New York State Department of Labor (DOL) administers the unemployment insurance (UI) benefits system for the state of New York. The system is funded by a variable tax on employers and is designed to alleviate economic insecurity caused by unemployment by sustaining income for individuals who find themselves temporarily out of work.

Under the federal statute, UI benefits are granted to those who earn sufficient income, and who become unemployed through no fault of their own.[1] Candidates for UI benefits must comply with registration, reporting, and certification requirements.[2] Claimants receive a Notice of Determination indicating whether they are eligible for benefits and what their Weekly Benefit Rate (WBR) is. A claimant who is dissatisfied with an initial determination may request a hearing before an Administrative Law Judge (ALJ), within 30 days after the mailing or personal delivery of the notice of the initial determination. (12 N.Y.C.R.R. § 460.1) When there is a dispute about an individual's eligibility for benefits, the issue will go to a hearing conducted by an ALJ. The ALJ's rulings may be appealed, in writing, to the Appeals Section of the Unemployment Insurance Appeal Board, which has the power to review any ALJ finding of fact or conclusion of law.

During the COVID-19 pandemic period from March 2020 until September 2021, unemployed workers who were not eligible for traditional NYS UI benefits may be eligible for Pandemic Unemployment Assistance (PUA). These programs have since ended. It is extremely unlikely that your case will be dealing with federal benefits and if you are concerned about a federal benefits issue, please reach out to VOLS.

i. Basic Purposes

The UI system is designed with two major purposes in mind 1) insurance against job loss and 2) economic stimulus. As insurance against job loss, the program is intended as partial income replacement to meet the needs of the short-term unemployed. As economic stimulus, the system is also intended to stabilize and stimulate economy by maintaining purchasing power of workers who have suffered job loss.

ii. Legal Framework

Both state and federal law govern the state UI system. Federal law defines the broad requirements of the system and state law establishes the eligibility requirements:

Federal Unemployment Tax Act ("FUTA"):

[1] Generally, for claims filed in 2020, in a statutorily described yearlong "base period," a claimant must have earned an amount over $2,600 in her most gainful quarter, plus at least one and one-half of that amount in the other three quarters. The claimant must also be ready, willing, and able to work; available for work; and mentally and physically capable of working. For detailed description of eligibility requirements, see Unemployment Insurance: A Bridge to Your Next Career, at 2-3, 10 at https://labor.ny.gov/formsdocs/ui/TC318.3e.pdf .

[2] Even if a claimant is denied benefits, she must continue to report weekly and search for a job – otherwise, even if she wins her hearing, she will not be eligible to collect benefits. It is very important to advise claimants that they must continue to report to the DOL while their cases are pending. For more information, see Unemployment Insurance: A Bridge to Your Next Career at 35, at https://labor.ny.gov/formsdocs/ui/TC318.3e.pdf.

- FUTA, 26 U.S.C.A. Sec. 3301 et seq. was enacted by Congress as part of the Social Security Act of 1935 and was intended to meet the needs of workers unemployed because of the Great Depression.

- FUTA is designed to encourage states to enact unemployment insurance (UI) systems by creating a system of federal monetary incentives for doing so.

- States that enact programs that meet federal guidelines receive tax breaks for employers and money to administer the UI system in their state (every state, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands have enacted UI programs).

- 26 U.S.C. §§ 3301 - 3311 (sets out the basic features of the unemployment program, including the financing scheme and selected requirements that govern state participation in the program).

- 42 U.S.C. §§ 501-04 (sets out process under which the U.S. Dep't of Labor will provide grants to the states for administration of their UI systems).

- The Coronavirus Aid, Relief and Economic Security Act sets out the rules and regulations for PUA.

State Law Implementation:

- New York UI statute, NY Labor Law, Article 18, §§ 500-643. Key provisions: § 527 (valid original claim), § 590 (rights to benefits), § 591 (eligibility for benefits), § 593 (disqualification for benefits)

- New York UI Regulations, 12 NYCRR §§ 460.1 – 490.7

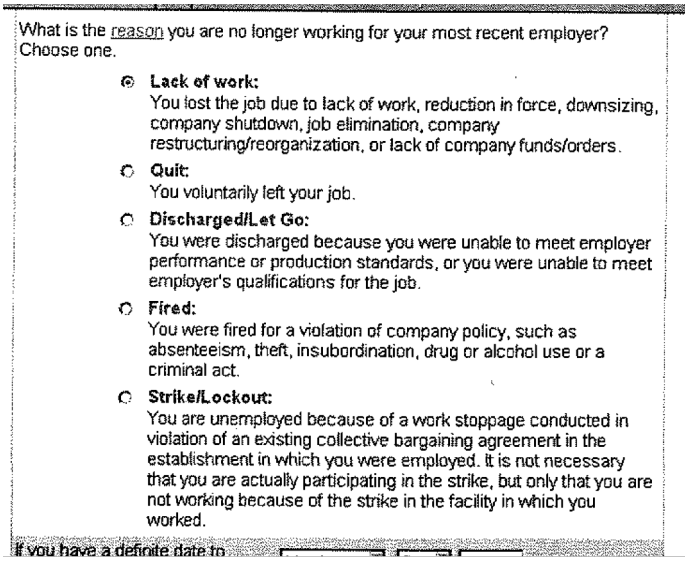
iii. Eligibility for Benefits

To be eligible for Unemployment Insurance, a claimant must (at the time they apply and for each week they certify thereafter):

1) Be unemployed "through no fault of their own;"
2) Have adequate past earnings;
3) Be currently (and "totally") unemployed for any day they are claiming benefits; and
4) Be actively seeking, and able to accept, reemployment.

B. Chronology of a Typical Unemployment Case

When an employee's job ends, she will file for UI benefits either online or over the telephone. During the application process she will have to specify how her job ended based on five multiple choice options as outlined below:


What is the reason you are no longer working for your most recent employer? Choose one.

- **Lack of work:** You lost the job due to lack of work, reduction in force, downsizing, company shutdown, job elimination, company restructuring/reorganization, or lack of company funds/orders.
- **Quit:** You voluntarily left your job.
- **Discharged/Let Go:** You were discharged because you were unable to meet employer performance or production standards, or you were unable to meet employer's qualifications for the job.
- **Fired:** You were fired for a violation of company policy, such as absenteeism, theft, insubordination, drug or alcohol use or a criminal act.
- **Strike/Lockout:** You are unemployed because of a work stoppage conducted in violation of an existing collective bargaining agreement in the establishment in which you were employed. It is not necessary that you are actually participating in the strike, but only that you are not working because of the strike in the facility in which you worked.

If you have a definite date to

i. If the Employer Is Consulted

When the employer is consulted, the LSR (Legal Service Representative, also called claims adjudicator) will reach out to the employer.[3] After speaking with the employer, the LSR will make an initial determination of eligibility/ineligibility and will send both the employer and the employee a Notice of Determination, which will state the specific reason for the decision.

If the claimant is found ineligible, she may request a hearing before an Administrative Law Judge (ALJ)[4].

If the claimant is found eligible, she will begin receiving benefits through either direct deposit or a Way2Go card within a few weeks. The employer may also request a hearing before an ALJ and they have time limitations on those requests.[5] The request for a hearing from a claimant must be sent within 30 days from the date the determination was mailed by the Department of Labor.[6]

ii. If the Employer Is Not Consulted

If the employer is not consulted, the LSR will award benefits simply based on the information provided by the claimant without contacting the employer. The claimant will begin to receive benefits and the DOL will send the employers whose accounts might be affected a Notice of Potential Charges and a Notice of Protest form. The employer can challenge the benefits by sending in this Notice of Protest or requesting a redetermination either by telephone or in writing. This redetermination is generally conducted by the same LSR, who then speaks to both parties.

[3] The employer (and the claimant) may be contacted by phone, through a mailed questionnaire, or both.
[4] Claimants can request an Unemployment Insurance hearing online or by mail/fax.
[5] Each employer's UI tax rate is based on how many of its ex-employees collect benefits, so employers have an economic incentive to challenge a claimants' eligibility. For more information on the employer's perspective, see Unemployment Insurance Employer Guide at https://labor.ny.gov/formsdocs/ui/P820.pdf https://dol.ny.gov/unemployment-insurance-handbooks-employers-0.
[6] See Labor Law § 620 (1)

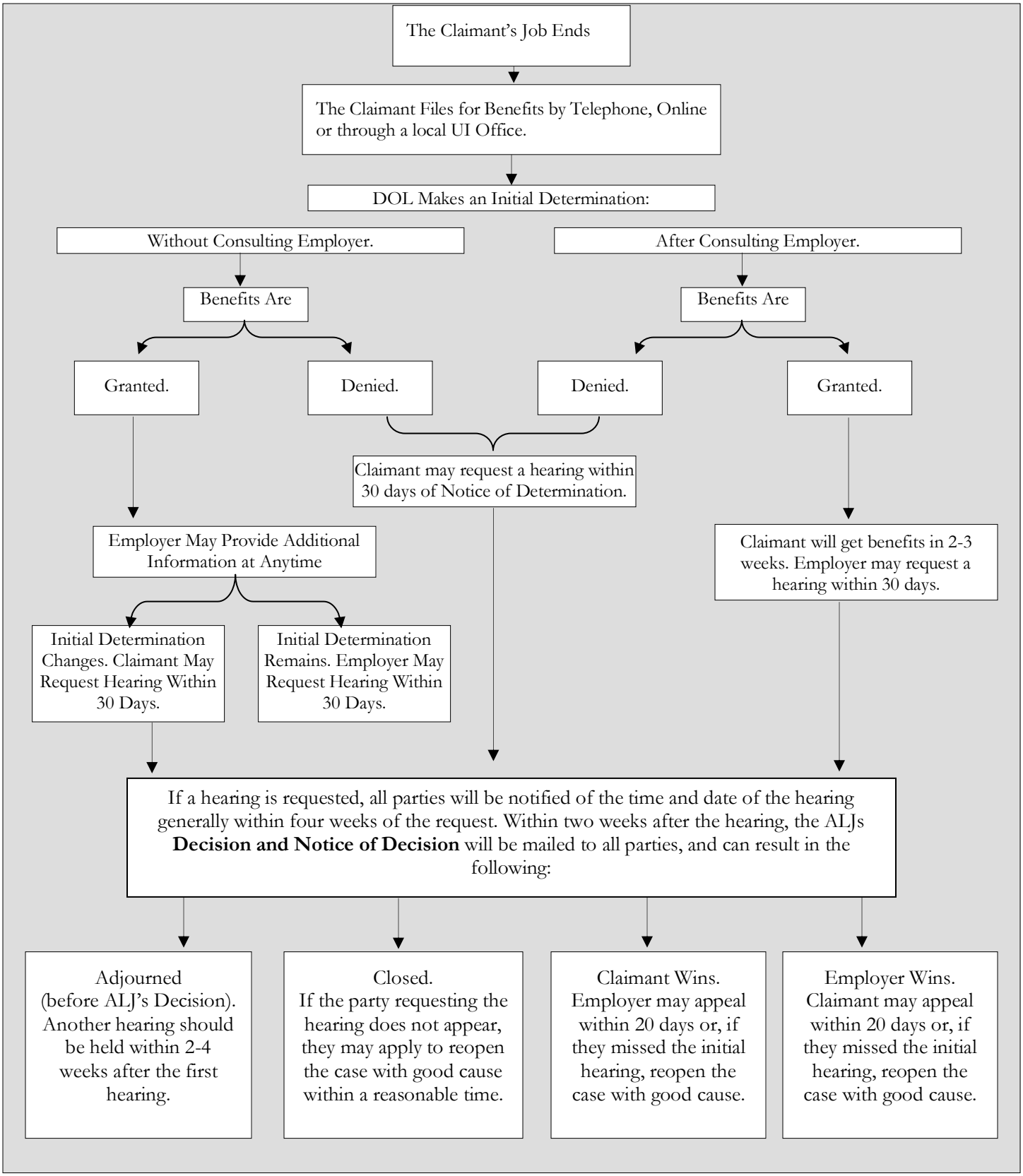
If the LSR finds the claimant ineligible upon re-determination, the claimant's benefits will stop and the claimant will receive a Notice of Determination stating the reasons why. The claimant's request for a hearing must be made in writing within 30 days from the date the notice was mailed.

If the LSR still finds the claimant eligible, the claimant will continue to receive benefits and the employer has a right to request a hearing.

Once a hearing has been requested by either party, a Notice of Hearing is sent to both parties.[7] The notice is usually sent between 10-14 days prior to the hearing date.

[7] A claimant may request a hearing on any determination affecting their right to benefits online, by fax, or by writing a letter to NYS Department of Labor, P.O. Box 15131, Albany, NY 12212-5131. (See Unemployment Insurance: A Bridge to Your Next Career, at 34 at https://labor.ny.gov/formsdocs/ui/TC318.3e.pdf.) Any request must be postmarked or otherwise proven to have been filed within 30 days after the mailing or personal delivery of the determination. Absent proof to the contrary, a determination shall be deemed to have been mailed on the date recited on it and received by a party to whom it is addressed no later than five business days after the date on which it is mailed. Make sure you include the last four digits of the claimant's Social Security number on the hearing request and a detailed explanation of why the claimant disagrees with the determination. You will be notified of the date, time, and place of the hearing by the Administrative Law Judge section after the request has been processed if there has been no change in the initial determination.

C. The Path of an Unemployment Insurance Case (Chart)



II. PREPARATION FOR REPRESENTATION

A. Taking a Case

VOLS will regularly circulate emails with a list of claimants in need of representation to all Project Volunteers. The list will contain the name of each claimant, type of employer, a hearing date (if a date has already been set), and a brief description of each case.

If you are interested in taking one of the listed cases, contact VOLS. If the case is still available, then VOLS will hold the case for you while you run a conflict check with your firm and open a new matter. Once the conflict check is complete, notify VOLS. VOLS will send you the client's contact information and any other relevant materials. Contact your client immediately to introduce yourself as a pro bono attorney through Volunteers of Legal Service and explain that you will be representing them in their unemployment insurance hearing.[8]

B. Important Documents

When you take a case, you should make sure that you have the following items, all of which are available from VOLS.

i. Case Profile

This is the initial information first sent around about the case, including client contact information, former employment history, and a brief case description.

ii. Retainer Letter

Your firm should have a standard pro bono retainer agreement that your client must sign prior to the start of your representation. Be sure to speak with your pro bono coordinator to obtain this form. If you are not affiliated with a firm or do not have a pro bono retainer agreement, contact the VOLS Unemployed Workers Project for a sample form.

iii. Notice of Appearance

This form will be provided to you by VOLS. You must fill it out and be sure to include any dates on which you are unavailable in the next 45 days to appear at a hearing. The Department of Labor will consider this document when it schedules the claimant's hearing. The form should state that that you are representing the claimant through the Volunteers of Legal Service Unemployed Workers Project, a part of the Department of Labor's Pro Bono Initiative. It should be **emailed** as early as possible to the hearing site fax number – most of our claimants are in Brooklyn: (Brooklynhearings@uiab.ny.gov), or, if the site is unknown,

[8] Even if you are not able to meet with your client right away, it is important that you contact your client as soon as possible so they can keep you updated when they receive notice that their hearing has been scheduled or any other new communication from the Department of Labor. Claimants often receive notice of a scheduled hearing date soon after they are referred for representation through VOLS.

to Albany at Menandshearings@uiab.ny.gov. These notices can also be faxed – fax numbers are also listed on the Notice of Hearing.

iv. Claimant's Rights

Review with your client the list of Claimant's Rights which is set out in the Quality Assurance Plan which is based on the MLC Consent Decree located in the "Reference Materials" Part C of this manual. It is a checklist of due process rights and standards of conduct which the ALJ and the Appeal Board must follow.[9]

C. Adjournments

Sometimes, your client's hearing date will come up before you've had adequate time to prepare her case. Request ALJs to grant your client an **adjournment** of the hearing to a later date if your client can show "good cause" for such an adjournment. For example, a claimant who needs more time to obtain proper legal representation has good cause.[9]

The ALJ should grant such good cause adjournment requests. However, most judges will instead "close the case with leave to reopen" if you are unable to proceed at the scheduled date. The Appeal Board encourages the ALJs to close cases with leave to reopen because the Board is required to complete cases within certain timeliness guidelines. A "closed" case appears in the records as a completed case, whereas an adjourned case does not. Your client will still be able to get another hearing if they can show they had a good cause reason for missing the first one.[10] Since many of our clients need their benefits as soon as possible, you want to avoid having your client's case closed in this manner.

Note that adjournments can be requested in advance for other reasons (e.g., if you, the claimant, or an essential witness cannot appear for a compelling reason, if the claimant is legitimately ill with documentation). Requests can be made in writing via email or by fax, or by calling the hearing office between 8:45 a.m. and 4:45 p.m.

Because your client's case will be delayed, you should not request an adjournment unless it is impossible for you to prepare the case in the time available. You should also be aware that **if your client has obtained an adjournment previously, the ALJ probably will close the case, forcing your client to reapply for a new hearing.** However, if you need to obtain a crucial document for evidence or to contact a witness, it is better to try to adjourn than to risk losing the case. Evidence that is not submitted at the hearing may not be submitted on appeal and the odds of winning on appeal are considerably lower.

If the claimant is requesting an adjournment when the employer is the party that has requested the hearing, some ALJs will choose to proceed with the hearing by taking testimony from the employer and will make their decision based on that testimony alone. If the ALJ makes a decision adverse to the claimant without taking the claimant's testimony, the claimant can request the case be reopened but her benefits will be stopped while the new hearing is pending. Requests can be made in writing, by fax, or calling the hearing office. It can also be made by stating you need an adjournment to the judge at the time the hearing is scheduled for.

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[9] https://uiappeals.ny.gov/postpone-hearing

[10] **Any party that does not attend a hearing after receiving notification may request one reopening** within a reasonable time. Any further requests to reopen will be referred to the Appeal Board. Administrative Law Judges will no longer grant a second leave to apply to reopen.

D. Follow Up

Please keep in touch with your client until you learn the result of the ALJ decision, and notify VOLS of the decision and any other important developments in the case. If more than 2.5 months have passed since your claimant requested a hearing and the hearing remains unscheduled, follow up with VOLS.

E. Withdrawal

If you decide to withdraw from a case after discussing the matter with your supervisor and with VOLS, you must send the DOL and your client a withdrawal letter, stating that you will no longer represent them, and that your withdrawal does not reflect upon the merits of the case.

VOLS volunteers should not withdraw from a case without consulting with VOLS. Examples of valid reasons for withdrawing from a case include: harassment by a claimant, intent to commit perjury, or frivolousness of a case.

III. SEPARATION ISSUES: "UNEMPLOYMENT THROUGH NO FAULT OF THEIR OWN"

A majority of UI hearings center on the circumstances of the claimant's separation from employment and whether the loss of the claimant's job was "through no fault of their own." New York Labor Law § 501. Generally, these cases turn on: (1) if the claimant was fired, was she fired for acts which constitute misconduct under unemployment insurance law? or (2) if the claimant voluntarily quit her job, did she have good cause to do so?

A. Misconduct Cases

While an employer may discharge an employee for any legal reason, not every reason for discharge will constitute misconduct under unemployment insurance law. Misconduct occurs when an employee voluntarily behaves in a manner that both damages the employer's interests and reasonably could have been avoided. In cases where your client was fired, your theory should show that even if she was fired for a stated reason, that reason does not amount to misconduct. In Matter of James, 34 N.Y.2d 491 (1974), the New York Court of Appeals first suggested that valid cause for discharge was not equivalent to misconduct.[11] The Appellate Division subsequently defined misconduct as a volitional act or omission, which is detrimental to an employer's interests. Mere inefficiency, or inadequate performance due to inability or incapacity is not misconduct. Neither is ordinary negligence, isolated bad judgment, or an intemperate outburst in the heat of the moment.[12]

The burden of proof is on the employer to show that the conduct rose to the level of misconduct.[13] Therefore, the employer will generally testify first in a misconduct hearing.

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[11] "There is no question that 'valid cause' for discharge must rise to the level of misconduct before an employee becomes ineligible to receive benefits. This, the division's regulations unequivocally expressed, in classifying, among other things, inefficiency, negligence, and bad judgment, as valid causes for discharge which do not render the employee ineligible." Id.

[12] Donlon v. Ross, 406 N.Y.S.2d 393; Matter of Choute, 367 N.Y.S.2d 617; In re Claim of Francis, 56 N.Y.2d 600 (1982)

[13] See Appeal Board Decision No. 542802 (no misconduct where employer alleged claimant had failed to clock out for lunch break but did not produce video surveillance footage of event despite claimant's failure to recall whether he had clocked out).

i. Questions to Consider in Preparing Your Case

- *Did the claimant have notice that their behavior could lead to termination? Was a warning given? Was this a first offense? Had the employer condoned or tacitly consented to a violation of its own rules?*

  Aside from the most extreme acts, an employer must give the claimant explicit notice that a particular behavior can lead to their termination before their violation of that rule or policy qualifies as misconduct.[14]

- *Was there a specific policy covering the behavior in question? Did the claimant know that she was violating policy? Was there an employee handbook that the claimant was aware of, a posting of policies and procedures, etc? If there was a progressive discipline policy in place, did the employer follow that policy?*

  Not every technical violation of an employer's policy rises to the level of misconduct. Matter of Vasallo, 125 AD2d 771 (3rd Dept 1986).

- *Was the claimant's act detrimental to the employer's interests?*

  It is insufficient for the employer to establish that it had a rule and the claimant violated that rule; rather, the employer must show the violation was harmful to the employer's interests. See Appeal Board Decision No. 537581 (no misconduct where claimant was discharged for driving on side roads instead of highways in course of employment, in violation of employer's stated policy, because no evidence that claimant had been previously informed of the rule and "no indication that the claimant acted in a manner that was contrary to the interests of the employer").

- *Was the claimant's act volitional?*

  For example, lateness due to a medical condition, childcare problems, or unforeseeable transportation delays should not constitute misconduct, even after the claimant had been repeatedly warned regarding the issue. An intemperate outburst against a supervisor during a heated conversation may not constitute misconduct even if in hindsight the claimant knew such behavior was inappropriate.[15]

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[14] See Appeal Board Decision No. 556177 (no misconduct where claimant, a client coordinator for a mental health provider, mistakenly directed client to take medication once a day instead of twice a day because claimant's mistake was honest and she "had never received a warning for transcription errors and could not have known her job would be in jeopardy"); Appeal Board Decision No. 552676 (no misconduct where claimant rented storage unit without checking photo identification of renter, in violation of employer's policy, because claimant attempted to fix error, had not previously been warned for violating the policy, and did not intend to harm employer's interests).

[15] See, e.g., Appeal Board Case No. 553544 (The claimant was fired "for continuing to disagree with the decision regarding his schedule and being loud and disruptive." The Appeal Board found this was not misconduct, noting that "although he raised his voice, he did not use any profanity or vulgarity" when disagreeing; it took place after the claimant had clocked out for the day; "emotions were running high"; the claimant did not receive an entirely satisfactory answer from his manager; and "he did not have a meaningful opportunity to disengage from the conversation and reflect on the possible consequences of his conduct."); Appeal Board Case No. 548361 ("The Court has held that employees owe a duty of respect and loyalty toward employers, neither are they required to always be servile and docile towards employers (See Matter of Raven, 40 AD2d 128 [3d Dept 1972]; See also Appeal Board Case No. 543118). While we certainly do not condone the claimant's actions, we also judge them in the context of the entire argument in which the supervisor also used profanity. We further find that the claimant did not provoke the encounter with his supervisor").

- *Was the claimant actually discharged due to the alleged misconduct?*

  There must be a direct causal connection between the alleged misconduct and the claimant's discharge. Even if the claimant's alleged act amounted to misconduct, that act must have been the cause of their discharge to justify a disqualification from UI benefits. Situations where there is a long delay between the claimant's alleged act and her actual discharge may give rise to the question of whether the claimant was discharged due to that act.

B. Voluntary Separation Cases

New York does not provide UI benefits to workers who voluntarily quit their jobs without good cause. NY Labor Law § 593(1). If the claimant quit, the burden of proof is on her to show good cause for doing so. Therefore, the claimant generally presents first in a voluntary separation hearing. It is important to focus on the last day of work or the final incident (if there was one) that triggered the separation.

i. Was the Separation Actually Voluntary?

The term "voluntary separation" as used in the statute means leaving employment of one's own free will. It includes resignations (other than those submitted at the employer's insistence) and failure to return to work following a temporary layoff or leave of absence. In many cases the employer will claim that the claimant quit their job or were discharged after they stopped showing up to work and the claimant will state she was laid off, discharged or simply never called in for another shift.[16] It is important to determine the circumstances in which the job came to an end, including who initiated the final separation, if there was formal documentation surrounding the separation or other actions were taken to indicate separation, such as returning work equipment or receiving unused vacation pay.

ii. If the Separation Was Voluntary, Was it Without Good Cause?

Once it is established that a claimant's separation is voluntary, it must be determined whether the claimant's choice to separate was "without good cause." Voluntary separation from employment shall not be reason to disqualify a claimant if "circumstances have developed in the course of such employment that would have justified the claimant in refusing such employment in the first instance." NY Labor Law § 593(1).

A claimant who voluntarily leaves employment must have had a compelling reason and must have made a reasonably prudent attempt to resolve the problem and protect her employment. Generally, if there is a compelling reason for the employee to quit, the employee must notify the employer of the problem. If the employer does nothing to remedy the situation then the claimant usually has good cause to leave, provided that the reason was compelling in the eyes of the judge.

Examples of "good cause" to voluntarily quit employment include:

- Changes in the "terms and conditions of employment" that would have justified refusing the job initially. See Matter of Sellers, 13 A.D.2d 204, A-750-1550. This could include a change in hours, reduction in hours or pay, or a relocation of the job site.

[16] See, e.g. Appeal Board Case No. 541727 (The employer placed the claimant on an involuntary, unpaid leave of absence with no certainty of return. Afterwards, the claimant sent by mail her building keys and passes but expressed no intention to quit. The Board found that "employer's conduct of placing the claimant on an unrequested (and therefore involuntary) unpaid leave of absence, with no definite return to work date, and no certain return to work at all, is tantamount to a discharge.")

- Work conditions which harmed the claimant's physical or mental health in a way that can be demonstrated through evidence. A.B. 6275-41.
- Abuse from management or other employees.[17]
- Fear for her personal safety on the job. Stark v. Ross, 411 N.Y.S.2d 433.
- Medical reasons prevented the client from continuing to work. Notably, this is only considered to be good reason to quit if the employer could not provide the claimant with a reasonable accommodation or other solution to this medical issue such as temporary leave. Ideally, the client should provide medical documentation. However, if there is no medical documentation, the client's testimony is also considered legitimate evidence of the medical condition.
- Violation of employment laws at the workplace, whether this was the claimant's primary reason for quitting.[18]
- Separation was for a "compelling family reason" under NY Labor Law § 593(1)(b).
- Other "compelling reasons," provided the client tried to resolve the problem with the employer before quitting.

IV. OTHER DIMENSIONS OF UNEMPLOYMENT INSURANCE CASES

A. Pay Attention to Threshold Issues

Threshold issues can disqualify your client from benefits even if she otherwise had a valid claim. While you should be aware of all these issues, if these will be issues at your client's hearing, they should be listed on the Notice of Hearing. Prepare for them as carefully as any argument on the merits. If an issue comes up which is not on the Notice, get an adjournment to prepare for it. Employers are also subject to certain threshold issues – always see if you can use one against them.

Threshold issues include:

i. Timeliness

Check to see if your client requested a hearing within 30 days after receiving the Initial Determination. If the employer did not request the hearing in time, you may be able to win on this issue alone and should be prepared to address it at the hearing. There is a very limited "good cause" exception – and even this is an understatement. The claimant or employer must have been hospitalized, or present credible evidence of mailing issues (reports to Post Office, demonstrate lack of other important notices, etc). If it is shown that there was "good cause" for the lateness, then the ALJ will rule on the main issue. See 12 NYCRR 473.1(h); Claim of Bashe, 504 N.Y.S.2d 812 (1986).

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[17] Courts have consistently found that a claimant left their job without good cause where the claimant did not give their employer notice of the alleged abuse prior to voluntarily quitting, where the claimant did not exhaust all their employers' internal mechanisms for resolving such disputes. Matter of Baxter (Commissioner of Labor), 162 A.D.3d 1451 (2018)

[18] Appeal Board Decision No. 546389 (claimant had good cause to quit where employer's treatment worsened in retaliation for her filing an OSHA complaint); Appeal Board Decision No. 545382 (claimant had good cause to quit where employer's failure to pay her overtime violated FLSA and NYLL); Appeal Board Decision No. 538428 (claimant had good cause to quit where he was subjected to a hostile work environment on the basis of his sexual orientation in violation of NYS HRL).

ii. No-Show at Hearing

If your client failed to attend previous hearings on this case, she has the right to reopen and request a second hearing date. However, at the start of the hearing the ALJ will address your client's absence and you will need to show that the client had good cause for missing the previous hearing. If your client appeared at an initial hearing but did not proceed because she wanted more time to seek representation, that reason alone should constitute good cause.

If an employer requests the hearing and then fails to appear, your client should win by default[19]. The employer, just as the claimant, may reopen if they have a good cause reason for not being present. If the employer reopens the case, find out why they failed to show up for the first hearing. If there was not a good reason for the employer's absence, object to the reopening of the case at the hearing when the ALJ addresses the issue.

If the employer does not show up at your hearing and the claimant requested the hearing, you will still have to proceed with the hearing and establish that the Commissioner of Labor's determination was incorrect for your client's benefits to be restored. If the claimant prevails at the hearing, the employer will have the right to reopen that hearing within a reasonable time upon a showing of good cause.

iii. Capable and Available

To receive benefits, your client must be capable of and available for work. NY Labor Law § 591(2). For example, someone whose job makes them ill has good cause to quit. If after quitting, however, she remains too sick to do any other work, she is ineligible for UI benefits while she is sick because her sickness makes her incapable of work. A claimant need not be capable of doing *any* type of work, but she must be capable of doing *some* type of work.[20]

B. Willful Misrepresentations, Factually False Statements, and Overpayments

A determination that a claimant gave materially false information to the DOL in the application or certification process can result in the recovery of already paid benefits, a civil penalty or fine, and a penalty towards collecting future benefits. This type of determination most often arises based on the answer the claimant selects to describe how she lost her job in her initial application for benefits. When a claimant files an initial application for benefits she must choose among five multiple choice options to describe how her last job ended, even if she never knew the reason her job ended or her job ended under ambiguous circumstances.

If the DOL subsequently comes to a different conclusion regarding the separation, a recoverable overpayment and willful misrepresentation finding can result. For example, if a claimant receives benefits after selecting in her initial application that her job ended due to "lack of work" and the DOL subsequently concludes the claimant actually lost her job due to a "quit," the DOL will generally make a finding that there has been a "willful misrepresentation" by the claimant. If the DOL determines that the "quit" was under

[19] It is not an abuse of discretion for the Board to deny an application to reopen where the party making it has not demonstrated a reasonable excuse for failing to appear at a hearing. see Matter of Cedeño [Commissioner of Labor], 83 AD3d 1350, 1351, 920 NYS2d 921 [2011]; Matter of Monroe [Commissioner of Labor], 59 AD3d at 837; see also 12 NYCRR 461.8).

[20] In re Claim of Pluckhan, 256 A.D.2d 1024 (1998)

disqualifying circumstances, they will also make a determination that she must repay any benefits she received based on this statement in her application. Such cases generally involve two separate sections of UI law that are often treated interchangeably.

i. Willful Misrepresentations

NY Labor Law § 594 outlines three general consequences for a claimant who is found to have "wilfully (sic) made a false statement or representation to obtain any benefit":

1) The recovery of benefits that were already paid based on that misrepresentation.[21] § 594(4).
2) Penalties towards the collection of future benefits. § 594(1).
3) And civil penalties in an amount equal to the greater of one hundred dollars or fifteen percent of the total overpaid benefits. § 594(4).

Confusion, poor language skills (either in interpreting a question or giving the answer), mistakes of memory, or the misinterpretation of legal concepts often give rise to findings of willful misrepresentation by the DOL. However, case law requires that a determination that a claimant made a willful false statement requires that the claimant acted knowingly, purposely, intentionally, or deliberately. *In re Barbera*, 28 A.D.3d 973, 974 (N.Y. App. Div., 3d Dep't 2006); *In re Schulman*, 9 A.D.3d 647, 648 (N.Y. App. Div., 3d Dep't 2004). Good faith mistakes, faulty memory, a showing that the claimant tried to convey the correct information to the DOL or had an incorrect understanding of the Labor Law should negate a determination of "willfulness."[22]

If the ALJ sustains a DOL determination that the claimant made a willful misrepresentation in their application but that the claimant is still entitled to benefits, the claimant will have to forfeit some of her future benefits (generally 4 effective days), but she can still otherwise collect benefits on her claim.

ii. Factually False Statements

Recoupment for benefits paid in error, even without finding a willful false statement, is based on NY Labor Law § 597(4), which explains that if the DOL determines after the fact that an award of benefits was erroneous, the claimant keeps the benefits:

> "provided they were accepted by the claimant in good faith and the claimant did not make any false statement or representation and did not willfully conceal any pertinent fact." NY Labor Law § 597(4).

For a recovery of benefits based on a "factually false statement" no willfulness is required. Look for a finding that the facts obviously fit the meaning of a technical term. Mistakes of law should not be penalized. Claim of Valvo, 454 N.Y.S.2d 695 (N.Y. 1982). Many supposedly make "false statements of fact," however, can be characterized as misunderstanding of legal concepts such as the distinction between "discharged" and "fired" or the definition of "employment" under UI law.

[21] In addition, § 594(5) allows the Commissioner of Labor to attempt to collect any benefits that have not been repaid via civil action or judgment.
[22] See Department of Labor, Unemployment Insurance Division, UIPL 1-2012.

C. Weekly Certification Requirements

Every claimant is required to certify for benefits online or via telephone once per week for each week they remain eligible for and are seeking benefits. For each weekly certification, the claimant must answer a series of questions establishing their eligibility for that particular week such as whether they worked on any day in that week; whether they were ready, willing, and able to work on any day that week and whether they refused any job offer without good cause. Claimants are not eligible to receive benefits for the weeks they failed to certify. [23] The DOL has become stricter about submission of backdated certifications and claimants should not expect to receive benefits for any week they failed to certify.

However, if a claimant applied for benefits weeks after they lost their employment or were otherwise not completely paid during their claim, claimants may request backpay. The DOL will allow New Yorkers to submit backdated certifications online, via a secure form that can be emailed directly to those with missing certifications. Claimants who are missing weeks of payments should contact the DOL and request a backpay form, which will allow them to indicate which weeks are missing and why these weeks are missing.

If your client has been denied benefits she should continue to certify while her hearing is pending and she remains eligible so that, in the event she prevails, she will receive retroactive payments for the weeks she had been certifying.

D. Total and Partial Unemployment

New York measures the duration and eligibility for UI benefits in terms of "effective days," not weeks. NY Labor Law § 590(3)-(4). Benefits are available for a day only to someone who is "totally unemployed" on that day. Claimants may be able to collect benefits if they are only partially unemployed in any given week and earn less than the maximum benefit rate[24] in that week, but they lose approximately one fourth of their benefits for each day worked.

i. Total Unemployment

Total unemployment is defined as a total lack of employment on any day. The term employment means any employment, even work for an hour or less and regardless of when or whether that person is paid. NY Labor Law §§ 522, 591(1). Employment can include self-employment, freelance work, commission-based work, assisting a family member in their business, or certain "volunteer work," whether remuneration is received.

ii. Partial Unemployment

As of January 18, 2021, the New York Department of Labor has changed the way partial unemployment benefits are calculated. Previously, claimants lost ¼ of their benefits for each day worked, i.e., a 25%

23 If your client has failed to certify during any given week, she was eligible for benefits, she must write a letter to New York State Department of Labor, Central Support Unit, PO Box 15130, Albany, NY 12212. The letter should include her name, address, telephone number, her Social Security number, the period for which credit is being requested, and the reason why she did not claim benefits for that period. She should also include any evidence that supports her reason for failing to claim benefits. The circumstances will be investigated, and a determination will be made regarding her eligibility for benefits for those weeks. If your client failed to file a claim when she first lost her job and is looking to receive credit for weeks before she filed her claim, generally she will have to show her mistake was due to either incorrect advice from the Department of Labor or incorrect factual information from her employer about the status of her employment.

24 As of April 2020, the Maximum Weekly Benefit Rate is $504/week.

reduction in benefits for each of four days possibly worked within the claimant's "effective days." The new calculation for partial benefits is based upon hours worked and is calculated as follows:

Therefore, claimants who work more than 31 hours a week are precluded from claiming benefits, even if these hours are worked within 3 days. This hourly calculation benefits claimants who work partial hours but work multiple days per week, for example, workers who are employed 5 days per week, but only four hours each day, who were previously unable to claim benefits.

Claimants may claim partial benefits if their work hours were reduced by the employer. If the claimant voluntarily works part time and there is the opportunity to work more hours, those claimants are ineligible for benefits. The $504 earning cap still applies and claimants who earn more than $504 weekly are still ineligible for benefits, no matter how many hours worked.

E. Determining the Benefit Rate and Handling Cash Wages

The claimant's entitlement to benefits is calculated using a Base Period. This base period is the first four out of the last five completed calendar quarters prior to the filing of the claim for benefits. The claimant must have wages in at least two calendar quarters of the base period and at least $3300 for claims filed in 2024 in earnings paid to them in the highest calendar quarter. Additionally, the claimant must have been paid, in the entire Base Period, at least 1.5 times of the highest quarter wages. A claimant who has insufficient wages to qualify for benefits under her Base Period may qualify under the Alternate Base Period, which is based on wages paid during the last four completed calendar quarters. The maximum weekly benefit rate is $504.

STANDARD BASE PERIOD					Filing Quarter
July August September 2019	October November December 2019	January February March 2020	April May June 2020	July August September 2020	October November December 2020
	ALTERNATE BASE PERIOD				

Sometimes a claimant receives a Monetary Benefit Determination that states a benefit rate lower than that to which the claimant is entitled.[25] All wages in covered employment should be included in calculating the claimant's benefit rate whether the wages were paid in cash or "off the books." Additionally, a claimant may want her benefit rate to be calculated using the Alternate Base Period because it will result in a higher benefit rate.

A claimant who wishes to use the Alternate Base Period or have non-reported wages counted towards their benefit rate should apply to the Department of Labor in writing within 10 days of the Monetary Determination and provide any proof of wages paid during the base period. This additional form, called a "Request for Reconsideration" allows a claimant to request a recalculation of their benefits. The Department of Labor then notifies the claimant if their benefit rate has been revised. If a claimant is still not satisfied with his or her benefit rate, he or she should request a hearing no later than 30 days after the date of the Monetary Determination with any papers or evidence that show wages. The Department of Labor will recheck the claim against the evidence submitted. If the Monetary Determination changes based on the evidence the claimant submits, he or she will be notified that a hearing will not be necessary. If the determination does not change, a hearing will be held as per the claimant's request.

F. Vocational Training/Section 599

Section 599 of the Labor Law allows a claimant to attend an approved vocational training course full time while still receiving benefits.

Section 599 provides that:

> A claimant shall not become ineligible for benefits because of the claimant's regular attendance in a program of training which the commissioner has approved. The commissioner shall give due consideration to existing and prospective conditions of the labor market in the state, considering present and anticipated supply and demand regarding the occupation or skill to which the training relates, and to any other relevant factor.

If Section 599 cannot be applied because one or more of its conditions are not met, participation in a training course will not render the claimant ineligible if she is ready willing and able to work, prepared to discontinue the training course if a suitable job opportunity is offered, and is making reasonable efforts to secure employment.

A vocational training course generally includes any training given under public or private auspices designed to develop an occupational skill. Special courses for training in a specific occupation given by colleges and comparable institutions may be considered vocational training approvable under Section 599. For example, an eight-week course at a State University, designed to provide the trainee with certain prerequisites that he needed to obtain a teacher's license, was approvable under Section 599. You should submit your application

[25] A monetary benefit determination may be lower because some wages may not be reported. Sometimes unreported wages can affect the benefit rate in the base period. A claimant's benefit rate is computed according to the employer's statement to the wage reporting file maintained by the New York State Department of Taxation and Finance. Where the employer has not properly reported the claimant's wages to the wage reporting file (including any cash or "off the books" wages), the Department of Labor is required to accept the claimant's assessment of earnings to determine the claimant's entitlement to benefits and weekly benefit amount. If the claimant cannot provide sufficient proof of earnings, the Department of Labor should send an individual wage request to the employer.

to the 599 program as soon as you are enrolled in a school or training program. If you indicate at the time you file your claim that you are already enrolled in, or have been accepted into, a course of study or training program, you will be asked for information about your training program as part of your claim. By answering these questions completely, you will be completing the application. You must apply for training approval within the first 13 weeks of your claim to receive the maximum amount of benefits you are entitled to. https://labor.ny.gov/formsdocs/factsheets/pdfs/P599.pdf

G. Preclusion Issues: Previous and Future Proceedings

Determinations made while litigating UI eligibility, even if upheld in the courts, have no preclusive effect in future litigation, except litigation concerning the UI claim in question. NY Labor Law § 623(2). Of course, witnesses' sworn hearing testimony will still be available for future cross examination.

Factual findings made by arbitrators or hearing officers under a collective bargaining agreement or civil service process do have preclusive effect in subsequent UI hearings.[26] However, the ALJ is free to find additional facts that are not inconsistent with those findings. Moreover, whether the circumstances of the separation constitute a voluntary quit or misconduct for purposes of unemployment law remain issues of law to be decided by the UI Appeal Board.[27]

H. Other Possible Issues

If your claimant is receiving a pension, she may have her benefit rate reduced. See NY Labor Law § 600. It is also quite possible that your client may have collected all the benefits to which she is entitled.[28]

I. Searching for Work and Refusing Job Offers

A claimant must be ready and willing to accept "suitable work" while collecting benefits. A claimant who "without good cause, refuses to accept an offer of employment" is disqualified from further benefits until she has earned ten times her weekly benefit rate. NY Labor Law § 593(2). For refusal of an offer of work to be disqualifying, it must first be an unconditional offer of a specific job on a definite date, and not just a general statement of interest inviting the claimant to inquire. AB 541821.

A specific and unconditional offer of part time employment from someone other than the former employer will be subject to the analysis set forth in Matter of Scranton, 12 NY2d 983. Refusal of such an offer is non-disqualifying if acceptance would cause a loss of income relative to full benefits for total unemployment on account of 1) a complete loss of eligibility due to acceptance (e.g. due to a partial schedule on each of four or five days) or 2) a partial loss of eligibility such that earnings plus remaining partial benefits would total less than the claimant's benefit rate for total unemployment (e.g. due to hours worked three or less days a week). An offer from the previous employer to rehire, but not to restore to the same job with the same conditions is treated differently so that the employer cannot affect an end run on the rules permitting a quit in the face of a change in terms and conditions. It may be refused without disqualification, without reference to the effect the partial employment would have on claimant's eligibility and overall income level. AB 555041, 575557, 542048. Even if the other terms are right, you have good cause to refuse, just as you would have good cause to quit if you were on the job already, if you have genuine and reasonable fears,

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[26] See e.g., Matter of Ranni, 58 N.Y.2d 715, 717, 444 N.E.2d 1328, 1329, 458 N.Y.S.2d 910, 910 (1982). Arbitrations are not claim-preclusive but may be issue-preclusive in UI cases.

[27] Matter of Guimarales, 68 N.Y.2d 989, 510 N.Y.S.2d 558 (1986).

[28] To calculate how many weeks of benefits may be left on your client's claim, including any applicable Federal Extended Benefits, use the UI Benefits Calculator at https://labor.ny.gov/benefit-rate-calculator/.

based on specific facts such as the employer's refusal to commit to necessary safety measures, that the employment would be harmful to your health.

i. What Must a Claimant Do to Search for Work?

All UI claimants must complete the work search requirements to receive benefits. Claimants must complete three work search activities per week, unless you have developed a Work Search Plan that was approved by the DOL. At least one of the work search activities must fall under the following categories:

1. Using employment resources provided by the local Career Center, including meeting with Career Center advisors or participating in instructional workshops.
2. Visiting a job site and filling out an employment application on site with employers who may reasonably have an opening.
3. Submitting a job application or resume to employers or organizations who indicate they have openings available.
4. Attending job search seminars, job fairs or workshops that provide tools to becoming re-employed.
5. Interviewing with possible employers.

Claimants must do another two activities, one or both of which can be selected from this list:

1. Applying for employment with former employers
2. Registering with and checking in with private employment agencies, placement services, universities, or other organizations to network for employment opportunities
3. Using the internet or telephone to search for jobs, find leads on new job opportunities, or making appointments for job interviews.
4. Applying for and taking Civil Service exams such that you are qualified to perform government work.

Claimants must "actively" seek new work, I.e., meet the work search criteria on a weekly basis. This does not mean claimants need to complete an activity every single day, rather, claimants must follow the work search guidelines and complete three activities every week. Generally, you do not have to search for work if your employer told you that you will be called back to work when the business reopens or if you were laid off in light of closed or reduced operations because of the pandemic.

ii. What Kind of Work Must a Claimant Accept?

During the first ten weeks of collecting benefits, suitable work is work that the claimant can reasonably do, through past training and experience. This means that she should look for work in all her most recent occupations, especially if the chance of getting work in her primary skill area is not good. Such work must also me at conditions (wages, compensation, hours) not "substantially less favorable than those prevailing for similar work in the locality." NY Labor Law 593(2)(d).

The claimant handbook says that until you have received 10 full weeks of benefits, you must accept any job if it 1) will pay at least the DOL "cutoff wage" (90% of the UI prevailing wage for that occupation; listed at https://www.labor.ny.gov/stats/uiwages.shtm), and 2) is in line with all your most recent occupations. After that, you must accept any job 1) that will pay the cutoff wage, 2) that will pay at least 80% of the wages in the high quarter of your base period, and 3) of which you are capable. The handbook says

nothing about whether it would pay below your benefit rate, nor anything distinguishing an offer from the previous employer. However, both these points are addressed in Appeal Board decisions.

iii. What Constitutes an Offer of Employment?

A job offer is only disqualifying if it is "an unconditional offer of a specified job starting on a definite date." Appeal Board Decision No. 549816. A general discussion of job duties, working conditions, etc. does not constitute an offer of employment. However, "[w]hen a claimant fails to contact a former employer after receiving a mailed notice from the employer offering him employment, the claimant's failure to respond to the offer prevents the employer from providing further information and is tantamount to a refusal of employment." (A-750-2113).

iv. What is Good Cause to Refuse Such an Offer?

A claimant would have statutory good cause to refuse an offer of employment if such employment is not suitable work (as discussed above); would interfere with union membership, a collective bargaining agreement, or a labor controversy at the place of offered employment; or would involve travelling an unreasonable distance or expense (generally over 1.5 hours by public transit in New York City). Additionally, the Appeal Board has established other good cause refusals such as where the employment would interfere with the claimant's childcare obligations, physical or mental health needs, or is reasonably likely to subject the claimant to other intolerable conditions at work.

J. Legal Claims

Your client may have potential legal claims related to her employment, such as discrimination or harassment. While you may not be able to represent her in such matters, remind her that some of these claims may be waived if not promptly asserted.

V. MEETING WITH THE CLIENT

A. Planning for the First Interview

i. Getting Started

Contact the claimant within 48 hours of assignment to set up a time to discuss the case. If a hearing date is already set, you should ensure you can obtain the client's case files immediately. Also, be sure to instruct your client to bring or send you all documentation from her previous employer and her UI claim. If you cannot obtain the case file from the client, you may request a copy of the case file from the DOL location the hearing will take place. You may make this request in your cover letter for your Notice of Appearance or call the relevant court and make the request over the phone. The file may be sent to an email address electronically or faxed to the relevant location for you to review.

ii. Earn Your Client's Trust

It is important that you learn the claimant's entire story. You want to be aware of what hurts her claim just as much as you want to know what will help her claim. Do not assume that you will automatically receive your client's trust. Remember, by the time you meet the claimant; she has lost her job, has been passed

through an impersonal unemployment bureaucracy, and has just been told that her benefits are being denied or challenged by her employer.

iii. Provide Your Client with Basic Information About the Service You Will Provide.

By explaining how the UI hearing process works, and what you will do to help your client win, you will gain her confidence and trust as you move through the case. Keep your explanation brief, and make sure to answer your client's questions or comments. It is important to have a dialogue rather than a monologue. If you start by doing all the talking, the client may become passive and not open up later on.

It is often best to begin with the following information:

- This is a free legal service.
- We help secure unemployment benefits, but do not help with other employment issues.
- A second meeting (at least!) will be necessary before the hearing to prepare for testifying at the hearing.
- The client must keep you informed as to any developments involving her case.
- The client must continue to certify for benefits to the Department of Labor as usual.
- Ask to see her Notice of Determination, and tell her very generally what the issue of the case is (misconduct, good cause to quit, etc.)
- Ask if she is comfortable having you represent her as you have described.
- Remind her that this is confidential.

Then make sure to have her sign your firm's pro bono retainer form. If your client has no further questions or concerns, begin the interview.

B. Conducting the Interview

i. Open Questions v. Closed Questions

Make sure to ask your client open-ended questions such as "Why did your job end?" as opposed to closed questions, such as "Did you quit or were you fired?" Open questions encourage clients to think and talk freely, so start with open ended questions. As you need more specifics, you should increase the number of closed questions you use to get the information you need to understand the case.

ii. Consecutive Questions v. Non-Consecutive Questions

As you interview the client, it is helpful to use consecutive questions that continue along the client's line of logic, such as "What happened next?" Consecutive questions will provide more complete information because they will walk the client step by step through her story without interrupting her train of thought. Non-consecutive questions often depart from the logic of the client and may cause the client to skip important parts of her story that may in fact be relevant.

iii. Direct Questions v. Indirect Questions

Direct questions specifically ask for information and request a response: "Did you violate the company's policy?" Indirect questions invite a response, but do not require one: "That sounds like a difficult policy to obey." Indirect questions let you probe potentially difficult subjects without a direct confrontation.

iv. Leading Questions v. Non-Leading Questions

Leading questions suggest the answer that is desired or assume a fact that hasn't been established: "Your boss harassed you, didn't she?" They are the ultimate closed questions, often limiting the answer to "yes" or "no." They yield little new information but can help focus on a specific fact. They can also suggest to the client a new way to view a situation or verbalize her thoughts: "So what she was really doing was..."

v. Silence

One of the best ways to get more information after your client stops talking is to non-verbally indicate that you're still listening, and then wait for her to say more. Silence is a powerful questioning technique because people feel compelled to "fill the void" and often blurt out the first thing that comes to mind. Try nodding instead of responding verbally to your client or, if you must say something, try "Is there anything else?" It will likely elicit more information from your client instead of a specific follow-up question.

vi. Question Content

Tell the client you need certain information to prepare a litigation strategy. Start by looking at the Notice of Hearing and Notice of Determination to get a general idea of what the case is about, including threshold issues. You should probably ask the following questions during your first meeting with the client (and with the most specificity of dates and names as possible):

- Are you currently employed?
- Who was your last employer?
- Where was your last employer located?[29]
- When did you start there?
- What was your job when you started?
- What was your job when it ended?
- Was it full-time?
- What were your primary duties?
- Were you a union member? Do you have a copy of your contract?
- When did you lose your job?
- What happened on the day you lost your job?
- (If fired) What reason(s) did the employer give for the loss of your job?
- Do you agree with these reasons?
- Why or why not?
- Did the employer ever give you any written warnings? Verbal warnings?

[29] This is important because hearings requested by the claimant are generally held at the DOL office closest to the employer, which may be Brooklyn, Manhattan, Garden City, Hempstead, Hauppauge, or White Plains. VOLS will generally only refer claimants for pro bono representation where their hearings will be in Brooklyn or Manhattan. Hearings may be held by telephone. If so, claimants will receive a notice in the mail letting them know the date and time when the judge will call them for their hearing.

- Are there witnesses, documents, or other evidence to support your story?
- What are the names and addresses of any witnesses? Would they testify?
- What papers relating to your claim did you bring?
- Do you have a written employee manual or other work rules?
- Have you participated in any other legal proceeding concerning your employment (hearing, arbitration, union grievance, etc.)?
- What do you expect the employer to say at the hearing?
- Is there anything else you want to tell me about?

vii. Listen to Your Client

Concentrate on how your client organizes her story and pay attention to any changes. Gaps in the story, or changes in how it is told (less detail, different point of view), may signal areas about which she is defensive or embarrassed. Repetition may signify her uncertainty or efforts to persuade herself. Also pay attention to patterns and changes in tone of voice or body language, which could indicate feelings or ideas she may not be fully expressing.

Try not to interrupt your client or talk too much yourself. Emphasize your interest by maintaining eye contact and avoid signs of impatience. Most importantly, do not rush to fill pauses in the conversation. Moments of silence may seem awkward, but they are a crucial part of any interview. As noted above, silence encourages clients to offer more information. It also gives your client time to think or remember. Therefore, wait politely but silently until it seems clear that your client has nothing further to say or consider saying.

viii. Question Your Client's Story

You need to know the whole story to be prepared, but many clients do not trust you enough to tell you the whole story at your first interview. Even when they do trust you, they frequently omit important facts. The trick is to probe for more information while retaining your client's confidence.

One way to bring out inconsistencies in your client's story is to repeat your questioning. If you are uncertain about any part of the story, check it by asking the same question in a different form, or you can make a statement that contradicts what she said and observe her reaction.

Don't hesitate to ask your client about difficult subjects, such as inconsistencies in her story, but make sure you explain why you need to know. Remind your client that ALJs are unpredictable, and the employer will use anything they can against her. Explain that "unpleasant" facts are likely to come out. Let her know that she does not need to be a perfect employee to collect benefits, you are on her side, and although you can't change facts or lie, if she tells you about it in advance, you will be better prepared to respond at the hearing.

ix. Ask Your Client to View Her Situation from the Employer's Perspective

To discover information that your client may be hesitant to admit, ask your client to describe things from her employer's perspective:

- Why does your employer say you shouldn't get benefits?

- Why do you think your supervisor would say he believed someone else rather than you?
- Is there anything else your boss or other witnesses might say at the hearing?

Such questions are better at eliciting harmful or embarrassing information, because they let your client "save face" – she can acknowledge opposing facts or arguments without crediting their truth. Make such questions a standard part of your repertoire and repeat them at your second interview as well.

x. Dishonest Clients

Most clients have legitimate claims for benefits. If, however, you encounter a claimant who is clearly lying or wants you to help her deceive the DOL, explain to her that making false statements in a hearing to obtain benefits is a crime and that you cannot assist her unless she promises to stick to the truth. If this does not resolve the situation, contact VOLS as you may need to withdraw from the case. Explain to your client that you will be unable to represent her if she lies under oath.[30]

xi. Other Witnesses and Evidence

Ask your client what other witnesses or evidence might support their story. Clients often do not realize that they will be limited on appeal to facts found at the hearing, and consequently decide not to get documents and witnesses because they think they will be able to bring them in later. Explain to your client that her chances of success are much greater at the hearing level than on appeal, and that it is very important that the two of you get (or diligently try to get) every piece of evidence reasonably available as of the hearing date.

When you have learned all that you can from the first interview, arrange a second, preparatory interview and tell the client that you may also call her with questions. Before she leaves, copy all potentially relevant documents for your file, even ones that you do not plan to present as evidence. You should make two extra copies of anything you plan to introduce as evidence, so that you can give them to the employer and the ALJ.

C. Important Documents

i. Notice of Hearing

The Notice of Hearing states the following important information[31]:

- the date, time, and location of the hearing
- the case number and the name of the ALJ chosen to preside

[30] If you have reason to believe that a client is lying while under oath you must stop asking questions on the subject matter. If you have an opportunity where there is a break or an adjournment, explain to your client again that you cannot ethically represent her if she is intentionally deceiving the DOL. Remind her of this, point out the suspect testimony, and ask her to explain. Remember that it is possible that she has recalled something during the hearing that she did not tell you previously. Generally, you should give your client the benefit of the doubt; human memory is imperfect, you were not a witness to the events, and in any event, it is the ALJ's job to determine her credibility. If you are still dissatisfied as to your client's honesty and cannot persuade her to testify truthfully, you have the option to discontinue direct examination when you return to the hearing. (Notify the ALJ that you will no longer participate in direct examination. She will continue to ask questions.) You should still cross-examine the other party and make a closing statement. If this happens in a hearing, please make a special note of it on your ALJ review form and inform VOLS.

[31] Some of this information may be on the back side or separate pages of the notice.

- the parties informed of the hearing
- which party requested the hearing
- whether it will be a phone hearing
- witnesses or paperwork a party may be required to present
- the issues to be determined at the hearing

It is possible that when you arrive at the hearing, the ALJ may change or add issues provided there is good cause to do so. If this is done, the ALJ must offer an adjournment. If the issues change during the hearing, ask immediately for a recess to see if you can clarify the issues with your claimant in a matter of a few moments. If you cannot, ask the ALJ for an adjournment so that you may prepare your case on this new issue, and ask the judge to clarify the issue on the new notice. You also have the right to object to the new issue.

ii. Notice of Determination

This document states the reason for the claimant's disqualification. Most often, this is based on information provided to the DOL by the employer. The stated reasons for disqualification become the main issue of the hearing. The ALJ will not allow the scope of the hearing to extend too far beyond the notice of determination. Keep this information in mind when asking questions but keep your mind open when your client describes the situation – the reasons in the determination are often inaccurate, and the ALJ can change the issues during the hearing (provided there is good cause and an adjournment is offered).

iii. Client's Summary of Interview Form

If the claimant spoke to an LSR (Labor Services Representative), you will find the client's Summary of Interview Form in the client's file at the Department of Labor. This document summarizes what she told the LSR in the interview. This document may be admitted to impeach her, so be careful to check it. Note that there could be discrepancies between what your client is telling you and what the interview form reflects. Make sure the client is prepared to explain all past statements made to the DOL if those statements are used to impeach the client during the hearing.

iv. UI Division Fact Finding Record for Discharge/Voluntary Separation

Both your client and the employer may have completed (or at least been sent) one of two versions of this form.

If there is any discrepancy between what these documents say and what your client has told you during the interview, be sure to discuss it with your client and realize the ALJ may bring these up at any point during the hearing. Pay particularly close attention to the UI Division Fact Finding Record for Discharge/Voluntary Separation. This form asks claimants to explain why their job ended. If your client filled out the wrong form by mistake, or gave different explanations on the form than what she tells the ALJ at the hearing, the ALJ may suspect that she is not credible. If you see any potential conflicts between her current story and what she wrote on any DOL forms she filled out, you need to talk with your client about what she wrote and why, so she can answer the ALJs questions at the hearing.

VI. IMPORTANT FACT FINDING AND LEGAL RESEARCH

A. Check the DOL File

Examine the file kept by the DOL regarding your claimant's case.[32]

Do not add, remove, or alter any documents in or attached to the file. Do not write anything on the folder – to do so may call into question the integrity of all the documents inside. If you wish to add or comment on anything in the file at this time, put it into writing to be submitted with the file. If you know ahead of time that you will be asking for an adjournment – write a letter stating your request and submit it via email or fax.

Note: Nothing in the DOL file will be a part of the hearing record unless, during the hearing, that document is properly identified and accepted into the record. See 12 NYCRR § 460.7, 461.4(j).

The file should include a summary of the DOL's interview of the employer, a summary of your client's Section C interview,[33] and a sheet stating the reason for the Initial Determination.[34] If at the time of the hearing the employer presents documents that were not in the file, take your time while reviewing them with your client during the hearing. If the judge does not permit this, tell the judge that they were not in the file when you reviewed its contents and ask for an adjournment if necessary. (Note: If the document raises significant issues that did not exist previously, this is also a reason to ask for an adjournment.)

The file may also include a CD ROM, USB, or transcript if there were any previous hearings. If overpayment is an issue there will be a Benefit Control Record computer printout, detailing all the checks that your client received. If your client did not provide you with a copy of her UI Division Fact Finding Record for Discharge/Voluntary Separation, find this document in the file and examine it carefully, as explained earlier. If this document or anything else in the file does not square with what your client told you, speak with her again.[35]

Listen to prior testimony. If there was a prior hearing, you will be provided a recording of the testimony taken. It is likely to be submitted to you via email, so you should ensure you have the proper means to listen to the prior hearing. You should listen to the recording and take notes on anything important your client already testified to or the employer raised in the last hearing.

B. Look for Any Evidence That Supports or Contradicts Your Client's Story

The key issue at any UI hearing is the credibility of each party. Thus, you can greatly strengthen your case if you can obtain documents or other evidence that support your client's story and be prepared to counter evidence that hurts it. Be imaginative–you can use correspondence from the employer, timecards, pay stubs,

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[32] This file will not be available until the client's hearing has been scheduled unless you request access to the file in advance from the UI Appeal Board Access Officer. Contact VOLS for an Access Request Form. This process is not always successful in obtaining access to the file before the claimant's case has been scheduled for a hearing.

[33] See Section V, Part C.

[34] If the documents from the claimant's initial application for benefits are not included in the file, make a note of this for yourself, and ask that a copy of that note be placed into the file as well. This will bring this issue to the attention of the ALJ and will relieve you from responsibility for their whereabouts.

[35] To learn the taxonomy of DOL forms, see the Insurance Forms binder at the DOL, which will identify all the forms currently used by the DOL (but not the Appeal Board). Forms here are identified by *number* and text includes the procedures that the DOL is to use in filling them out. https://www.labor.ny.gov/secure/foilrequest.shtm

medical records or prescriptions, letters from health professionals, award certificates, news articles, employee handbooks, other publications, dated bills, and receipts, etc. Have your client help you get them. Always try to obtain original documents; if that is impossible, get clear photocopies. Don't forget to make copies for the ALJ and the employer. And remember to keep the documents relevant to the issues the ALJ will be concerned with.

Sometimes you can obtain the employer's personnel records on your client directly from the employer by (1) sending/faxing an Authorization to Review Claimant's File signed by your client, or (2) asking your client to write a letter specifically authorizing the release of the records. The employer is not required to honor your request, but you can argue that it is in their best interests to do so since if they refuse, you can subpoena the documents. In addition, if the employer uses any records at the hearing, you will need time to study the documents and will have to request an adjournment on the day of the hearing to do so. Even if the employer releases the records, beware of strategic omissions. Generally, the employer will send any relevant personnel records to the DOL during the initial investigation of the claim and those records will be available in the file prior to the hearing. It is customary to engage in discovery and most employers generally do not respond to requests for more information. Other personnel records may not actually be relevant to the issues at your hearing.

On occasion, you may require documents from the intake officer to whom your client first made her claim. Many of these will be in the claimant's file at the DOL. If they are not in the file, make your request to the DOL representative at the hearing to provide this information. If there is no DOL representative set to participate in your hearing, you or your client should also call or visit the local UI office to request the documents.

You can request local phone records by asking the claimant to go to their local telephone provider's office. The claimant should provide the customer service representative with the exact dates and telephone number she is requesting a report for. Phone records may also be requested through the local telephone provider's legal department, but this process may take an extended period.

i. Subpoena Requests

If the employer refuses to provide helpful documents, you may be able to **subpoena** the employer to produce them. Subpoena requests are rare in unemployment insurance hearings, but it is important to know the process should the need arise. There are two ways to do so.

1. Fax your request for a subpoena to the hearing office or make a request in writing at the hearing office. Make your request for subpoenas as far in **advance** of the hearing as possible. Subpoenas take at least one week. Be prepared to justify the importance of your request.

2. If your subpoena request is rejected (which is likely), you can make it again to the ALJ who conducts your hearing.

Requests for subpoenas are in the form of an **offer of proof**: state what facts the materials will purport to prove and why those facts are relevant to the case. If you get the subpoena, the employer must produce the specified items on the day of the hearing, and you will get approximately 15 minutes to examine them with

your client before the start of the hearing. If you need additional time, request a further recess or an adjournment to another date.

Both Administrative Law Judges and attorneys of record[36] can subpoena witnesses who currently work for the employer. Usually, you don't want to subpoena anyone who isn't willing to show up voluntarily or who still works for the employer–they won't be inclined to help you. However, a subpoena may help a friendly coworker who wants to testify but fears retribution from the employer. A subpoena can provide some "cover" for such a witness–she can tell her employer that she "had no choice" but to testify. Request subpoenas as far in advance of the hearing as possible by faxing the request to the hearing office, or by making the request in writing at the hearing office. Again, be ready to explain why the witness is important and directly relevant to your case. Sample subpoena requests and form letters to employers are included in the reference materials at the end of this manual.

C. Seek Out and Interview Other Witnesses

When speaking with your client, ask if there are any other individuals who could back up your client's story. In most cases, there will not be a perfect witness or individual. Always interview any witnesses prior to the hearing using the same questioning techniques discussed in the previous section. Determine whether they would be willing to attend the hearing and strengthen your case. Remember to keep witness testimony relevant to the issues of the case. Some ALJs frown at hearing testimony from witnesses that were not employed by the employer unless they are deemed as critical. For example, ALJs may not find a biased witness such as a family member or friend of the claimant to be a worthwhile witness.[37]

The ALJ has discretion as to whether a witness can ultimately testify at the hearing. Some ALJs have been known to telephone witnesses if an issue comes up for which neither side was prepared or if the witness may have particularly relevant testimony.

Prepare your witness – let her know how to login to the WebEx or phone system, that she will be sworn, and that if she plans to refer to any materials, she should have them within reach when the ALJ calls (this is especially important with doctors). If the ALJ decides not to allow your witness's testimony, call the witness as soon as possible after the hearing to let her know.

D. Researching New York State Unemployment Insurance Law

Once you know the facts of your case, find out how the UI law has been applied in similar cases. There are several resources available to research UI law. Become familiar with them. These resources include:

<u>The DOL Website</u>

The DOL website is located at https://dol.ny.govhttp://www.labor.state.ny.us/ and has helpful information that is easy to access. The "Claimant Frequently Asked Questions" section will help you in answering many of

[36] Under 12 NYCRR § 460.4(a)(2), "[a]n attorney who shall have filed with the board a notice of appearance on behalf of any party may issue and cause to be served, subpoenas to compel the attendance of witnesses in accordance with sections 2302 and 2303 of the Civil Practice Law and Rules." See Section XIII, Part D, Sample Subpoena Request.

[37] Outside-of-work witnesses tend to be irrelevant in misconduct cases since the issue concerns the employer's reasons for termination of employment and the conduct of the claimant that led to the termination.

the common questions you will get from your client regarding UI Benefits that may not be directly related to your case.[38]

Appeal Board Search Feature

The Unemployment Insurance Appeal Board's website has a search feature that will allow you to search many recent Appeal Board decisions. This search tool is very helpful for finding recent cases that are on point with the issues you are researching. You can use a key word search and a connector to limit the search, e.g., if you put in "security guard" you may get hundreds of cases; but if you put in "security guard and provoked discharge" you will get less cases. This feature is available at https://uiappeals.ny.gov/searchdecisions.http://www.labor.ny.gov/ui-appeal/search-board-decisions.page?

Interpretation Service Index (ISI)

The department's interpretation indices are especially helpful and can be found at https://labor.ny.gov/ui/aso/interpservice.shtm. It is a partial digest of old Appeal Board decisions compiled by the DOL. The Index is quite helpful because these decisions show how the Adjudication Services Office interprets standards like "misconduct" and "good cause" in specific factual scenarios. Within this link, there are indices in which you can look up hundreds of UI cases on issues such as misconduct, refusal of employment, and willful misrepresentation.

Appeal Board decisions are cited with "A.B." followed by a number. When you find a decision on point in the ISI click on the hyperlink and read the case in full (they are usually very short opinions). It is also useful to Shepardize the case as you may find other relevant case law that supports your client's case.
There is a separate Tax Liability Index that you should use if your client's status as an "employee" is at issue (e.g., "independent contractor" cases).[39]

LEXIS and WESTLAW

Most of the UI decisions you will find on Lexis/Westlaw will be from the Appellate Division, Third Department and represent broader legal principles in UI law that may not be as fact specific as the above resources. Still, you may find these cases to be a useful guide. Begin by searching New York State cases under "unemployment insurance and misconduct/quit without good cause." Searches can be narrowed by topic (absence, drug use, etc.) or date (after 1985, etc.). If you already have specific cases in mind, you can Shepardize them online.

Some cases to begin a search with are:

TYPE OF CASE	CASE CITATION
Misconduct	*In Re Claim of Waszkiewicz*, 257 A.D.2d 882, 684 N.Y.S.2d 52 (1999) *In re Claim of Jacob*, 240 A.D.2d 798 (Poor judgment may not be misconduct.) (1997)

[38] Available at: https://labor.ny.gov/ui/faq.shtm.
[39] For Independent Contractor cases you will also find the list of factors considered by the DOL at https://labor.ny.gov/ui/claimantinfo/ui%20and%20independent%20contractors.shtm to be a useful guide.

	In re Claim of Pfohl, 9 A.D.3d 729, 779 N.Y.S.2d 831 (2004) (poor behavior did not rise to the level of misconduct) *In re Claim of Wlos*, 42 A.D.3d 719, 839 N.Y.S.2d 330 (2007) (unprofessional attire did not constitute misconduct) *In re Claim of Marc*, 93 A.D.3d 991, 939 N.Y.S.2d 737 (2012) (poor work performance did not rise to the level of misconduct) *In re Claim of Jackson*, 120 A.D.3d 1503, 992 N.Y.S.2d 382 (2014) (refusal to sign agreement may not be misconduct) *In re Claim of Garcia*, 171 A.D.3d 1384, 96 N.Y.S.3d 918 (2019) (disruptive conduct didn't constitute misconduct)
Absences/Tardiness	*In re Claim of Sunderland*, 121 App. Div. 2d 779, 503 N.Y.S.2d 191 (1986) (tardiness and excessive absenteeism). *In re Claim of Russo*, 286 A.D.2d 847, 730 N.Y.S.2d 374 (2001) (unexcused absence) *In re Claim of Anumah*, 60 A.D.3d 1216, 876 N.Y.S.2d 172 (2009) (excessive absences and tardiness) *In re Claim of Buyukcekmece*, 82 A.D.3d 1400, 918 N.Y.S.2d 272, 273 (2011) (tardiness) *In re Claim of Suchocki*, 132 A.D.3d 1222, 18 N.Y.S.3d 773, 774 (2015) (absenteeism)
Job Refusal	*Hoffman v. Catherwood*, 34 A.D.2d 871, 311 N.Y.S.2d 129 (1970) *In re Claim of Szatko*, 171 A.D.2d 911, 566 N.Y.S.2d 784 (1991) *In re Claim of Wilson*, 241 A.D.2d 653, 660 N.Y.S.2d 176 (1997) *In re Claim of Di Stefano*, 304 A.D.2d 950, 757 N.Y.S.2d 157 (2003) *In re Claim of Reisen*, 129 A.D.3d 1433, 1433, 10 N.Y.S.3d 911 (2015)
Quit	*Claim of Gunnip*, 108 A.D.2d 1007, 485 N.Y.S.2d 394 (1985) (verbal abuse) *Matter of Cantor (Levine)*, 50 A.D.2d 638, 374 N.Y.S.2d 161 (1975) (job adverse to health) *In re Claim of Knoblauch*, 239 A.D.2d 761, 657 N.Y.S.2d 250 (1997) (reduction of hours and elimination of benefits) *In re Heller*, 83 A.D.3d 1229, 921 N.Y.S.2d 403, 404 (2011) (pay reduction) *In re Campise*, 150 A.D.3d 1523, 1524, 54 N.Y.S.3d 761, 762 (2017) (denial of raise)

Question of Quit vs. Fired	*In re Claim of Jakab*, 186 A.D.2d 304, 587 N.Y.S.2d 789 (1992) *In re Claim of Lukaszewski*, 249 A.D.2d 861, 672 N.Y.S.2d 466 (1998) *In re Burke*, 11 A.D.3d 870, 783 N.Y.S.2d 164 (2004)

The Statutes

The Unemployment Insurance Law statutes can be found online at https://labor.ny.gov/ui/dande/article18.shtm and in governing Book 30 (Labor), Articles 18, 25-B, and 25-C (1988) (N.Y. Lab. Law §§ 500-643, §§ 861-861-G, and §§ 862-862-E (McKinney).

New York Codes, Rules, and Regulations (NYCRR)

Relevant UI Rules and Regulations can be found online at https://labor.ny.gov/ui/dande/regintro.shtm. 12 NYCRR §§ 460.1-465.9 lists procedural rules governing practice before the ALJs and the Appeal Board. Sections 473.1-473.5 provide information about claims and reporting, and §§ 482.1-482.5 deal with vocational training issues. The NYCRR is summarized in (but not to be substituted by) Rules and Regulations Governing Practice and Procedure Before Administrative Law Judges and Appeal Board, a DOL pamphlet.

Bench Manual for Hearing Officers in Administrative Adjudication (ALJ Manual)

Sets detailed standards for how ALJs should conduct hearings and constitute "recognized guidelines" for written UI decisions. The Bench Manual is available on the DOL's website.

Special Bulletins (A-710 Series)

Short papers outlining the DOL's position on specific issues. Certain bulletins have been recognized as having the force of law and can be found on the Department of Labor's website.

Adjudication Services Office Review Letters

Yearly releases from the Adjudication Services Office (ASO) indicating the DOL's interpretation of recent changes in the law. Useful as an explanation and tool for understanding the DOL's position, and possibly as persuasive authority but these letters are not law and should not be cited as such. These can also be found on the Department of Labor's website.

VII. DEVELOPING YOUR CASE THEORY AND PREPARING YOUR CASE

A. Brainstorm Potential Theories That Could Apply to the Facts and Law

Your **theory of the case** (**theory**) consists of your most favorable facts, combined with the law you want the ALJ to apply to those facts to show your client is eligible for benefits. Don't offer the ALJ a hodgepodge

of different factual or legal theories: you will look like you don't know what you're talking about or don't have a consistent story about what happened. Select what you believe will be the most persuasive theory and focus your advocacy efforts on proving it.

Your theory will generally be based on whether your client was fired or quit. There are several ways to argue either situation, and you should not select a specific theory until you've brainstormed all possibilities.

B. Make Sure the Theory You Select:

i. Focuses on the Last Day of Employment

In hearings arising out of how the claimant's previous job ended, the focus of the ALJ's inquiry will be on the final incident that precipitated the claimant's separation (whether the decision was the claimant's or the employer's). The day when your client was fired or quit is generally the point at which the ALJ measures whether there was misconduct or good cause to quit. Your theory must therefore show that the legal standard was not met on that day. Generally, anything occurring after that day is irrelevant. Anything that happened before that day will not influence the ALJ unless you connect it to what happened on the last day**.** Oftentimes, the ALJ will not ask questions about or get into the details of the "context" i.e., previous incidents that led to the "final day." It's important to alert clients that not every detail of their situation will be addressed at the hearing and that the ALJ will focus on the last day of employment.

ii. Is Simple

A theory that is easy to understand is more likely to be believed. To keep your theory simple, focus it narrowly on the legal standard for eligibility, and don't stray into side issues that do not address that standard. The test: If you are unable to summarize in two to three sentences why your client should get benefits, your theory is not ready to present to an ALJ. Your theory will be what makes up your closing statement at the hearing, so make sure you can summarize it succinctly.

iii. Balances Both Rational and Emotional Appeal

In addition to your legal argument, present your client as a hardworking, sympathetic individual who deserves benefits. Do realize that there are some ALJs (look at their review files before preparing your theory and strategy) who do not care to know the personal side of your case, so discussions of past good-performance and behavior, while valuable in establishing the credibility of the claimant, will be thrown out by ALJs who only want to hear about the circumstances surrounding the last day of employment. But it does not hurt to try to introduce this information. It is very important to establish that your claimant had never done anything wrong before being suddenly fired.

C. Write Out Your Theory and Discuss It with Your Supervisor or VOLS Staff.

Always write out your theory to clarify it in your own mind and test it for simplicity. Also, discuss your theory with your advisor–a second opinion will help you sharpen your theory and plan how to prove it.

D. Anticipate the Employer's Theory

Try to figure out the employer's theory of the case: what legal arguments will they have to make, what facts will they have to prove, and how might they try to prove them? This will help you to anticipate issues at the hearing so you can plan to win these disputes. Reviewing the case file at the DOL will help you to identify potential arguments. The employer interview and any documents submitted by the employer will be information that will clue you into what the employer will most likely be asserting at the hearing.

Also, anticipate the employer's possible witnesses and documents that are not in the file but easily could fill in missing pieces of the puzzle. Ask the claimant what they think the employer will be prepared to argue. It is also always important to ask the claimant who they think will show up at the hearing to represent the employer. The claimant will usually have helpful information about the characteristics of the employer and the people who worked with them. This kind of information is helpful for cross-examination as well as dealing with the employer's theory of the case.

E. Draft a Fact Checklist and a Preliminary Closing Statement

List the facts that you will need to prove or bolster your theory and write up a **fact checklist** of these items. By proving as many of these "specific" facts as possible, you will persuade the judge to accept your client's overall story.

For example, if your client is accused of misconduct for being absent without notifying her supervisor. Your theory is that her action did not rise to the level of misconduct because her absence was an isolated incident; moreover, she tried to follow what she thought was company policy by calling in sick and leaving a phone message for her supervisor, but this message was never passed on to the right person. To prove this theory, your fact checklist could include the following:

- Your client had a good work and attendance record.
- She had a compelling reason for her absence that day.
- She has proof of a visit to her doctor.
- The company employee manual did not specify a proper procedure for calling in sick.
- She did leave a phone message with a specific co-worker.
- That co-worker forgot to pass on the message.

Your checklist should also include more detailed facts that help prove the broader facts. Proving enough facts on your checklist should prove your overall theory, provided you organize the facts into a coherent argument.

To do this, take the facts from your checklist and use them to write a first draft of your **closing statement.** A closing statement is your theory with an expanded "facts section": your overall version of what happened, with specific facts plugged in to prove it step-by-step. By drafting your closing statement now, you organize your thoughts, identify the argument you want to be able to make, and identify those facts from your checklist that you must prove to make that argument. Remember that the closing statement is **very short**. Reiterate the main points of your client's testimony, the theory of your case, and the case law to back it up. If you have case law available, be sure to provide two copies of the case: one for the judge and one for opposing counsel.

Once you've drafted your closing statement and identified the facts you must prove to make that statement persuasive, you need to plan out how you will prove those facts through direct and cross-examination.

F. Introducing Evidence

You submit copies of any document you plan to introduce into evidence. Any audio or video recording you plan to introduce should be copied onto a CD/DVD/USB drive so that it can be made a part of the hearing record.

VIII. PLANNING THE DIRECT EXAMINATION AND PREPARING YOUR CLIENT FOR THE HEARING

A. Identify the Facts You Need from Each Witness to Prove Your Theory of the Case

Your direct examination should prove the specific facts in your closing statement and your overall theory. Without proper, thorough, and thoughtful direct examination, your client will lose. It's important to know that most ALJ's conduct an initial direct examination of the client, then you as the representative are entitled to follow up with your own direct examination. The ALJ will often cover the "basics" of the situation – when was the claimant's last day of work, when they applied for benefits, etc. Do not ask the same questions as the ALJ in your direct.

In addition to all your legal arguments, you may wish to include anything that indicates your client had a good work record (raises, promotions, merit awards, good attendance, etc.). Some ALJs are more sympathetic toward people they believe were good workers (but keep this information relevant, since ALJs don't appreciate having their time wasted).

B. Write Your Questions in Simple Sentences That Are Neither Too General Nor Too Leading

Write out a list of questions that will elicit the key facts. They should be short simple interrogatory sentences: Who...? What...? When...? etc. On direct, avoid leading questions–those that suggest the answer you desire. Even if the ALJ lets you lead, your witness is more credible when she testifies without your prompting. The ALJ will ask questions of your client before you and may ask some of the questions you've prepared. You may respectfully request to begin direct examination, but if the judge denies your request, be prepared to conduct follow up direct examination after the judge is done questioning.

Also, avoid the other extreme: questions that are so general that your witness isn't sure what you want her to talk about. The questions should focus the witness on a specific topic without restricting what she can say about it. You can sometimes do this by prefacing a series of questions with a **topic sentence**: **"I'd now like to ask you about..." "Let me direct your attention to..."**

An Example:

Say you want your client to testify that her boss told her she was firing her to cut costs. If you asked:

"Did your boss ever tell you she was laying you off to cut costs?"

Most ALJs would find this impermissibly leading. To avoid leading, you might ask her to describe the events of the morning:

"When did you learn you were laid off?" Then ask,
"What happened?" or "What were you told?"

While these questions could get the answer you want, they are so general that your witness may talk about other things, or not recall the specific fact you are looking for. A better alternative:

"Did your boss say why she was firing you?"

This question focuses the witness on the subject without suggesting an answer. It does not assume that the boss said anything. You could also focus the witness with a topic sentence:

"I'd like to ask you about how you heard you were being laid off."
"Who told you?"
"Did she explain why?"

C. Make Sure the Focus of Your Direct Moves Quickly to the Last Day of Employment

Think about the best way to let the client's story unfold chronologically. Whatever order you choose, bring the client quickly to the subject of her last day of work. This is always the ALJ's main focus, and the ALJ will lose interest if it is not yours as well.

Overall, make your direct complete, but brief and to the point. Don't dwell on matters that are not essential to your theory of the case.

D. Introduce Documents or Other Evidence to Support the Client's Testimony

Be sure to offer any documents or other evidence that support your client's credibility. Make sure you have a copy of anything you will be introducing into evidence ready for the judge and the employer. When you introduce a document use the following simple steps:

- "Witness, do you recognize this document?"
- "Can you tell us what it is?"
- Establish when, why, and by whom the document was prepared.
- Bring out the relevance of the document. (Use your judgment. You may decide to establish its relevance before introducing it.)
- "Judge, I offer this as Claimant's Exhibit number [one, two, etc.]."
- Provide a copy for the judge and the employer (some judges are very adamant about this and will be irritated if you do not provide these copies).

E. Acknowledge Weakness of the Client's Case During Direct

It is often useful to 'draw the sting' of cross-examination by asking your client on direct to explain weaknesses in her own story. This gives her a chance to fully explain herself to a friendly questioner, and defuses the impact of negative points. Make sure, however, that your client is well prepared for these questions, and don't draw attention to anything that wouldn't otherwise receive it.

F. Listen to the Answers and Follow Up if Needed

The single most important thing to do when conducting direct is to listen carefully to your witness's answers. Take brief notes to keep track, and always remember what you need to prove your theory. If your witness omits anything important, ask a follow-up question to get the missing information.

Sometimes, a frightened client will misspeak during her testimony, giving an answer that you know is both incorrect and harmful to her case. You must act to correct this. If you think your client simply misunderstood the question, apologize for not making the question clear, and ask it again in a simpler way. You can also change topics, and then return to the problem area later from another angle, which you think is more likely to remind her of the correct response (this is particularly useful if the first question came from the ALJ). If she contradicts what she said before, point out the conflict to her, and elicit her agreement that she was mistaken before. You can also introduce a document and have her take a moment to review it to "refresh her recollection" of details which she had misstated.

There is no substitute for preparation. Often the best form of damage control is to familiarize your client with potentially difficult areas before the hearing. Find the spots where your client has trouble (remembering exact dates, for example) and help her to compensate (by constructing a timeline beforehand, or by referring to a calendar in the room). If she becomes confused or nervous in the hearing, it is usually possible to ask the ALJ for a brief recess to speak with her outside.

IX. PLANNING AND CONDUCTING CROSS EXAMINATION

A. Consider for Each Opposing Witness Whether You Can Achieve Any of the Three Goals of Cross-Examination

Cross-examination is the single most difficult advocacy task. You must therefore plan it carefully. In this type of hearing, you cannot finalize your cross until you hear the witness on direct. However, if you consider the employer's likely theory of the case, you can anticipate much of the witness's direct testimony. By planning for how you wish to cross-examine, you will be ready to make last-minute changes and advance your theory when you get to question the witness.

It is important to ask your claimant beforehand who might be testifying on behalf of the employer. Your claimant can assist you in identifying what the employer's witness can personally testify to and what is hearsay.[40] Always establish from the beginning the source of information. Does this witness have first-hand knowledge of the incident? Did she write the report? Did she witness the incident, or did she just hear about it? If the information is hearsay, bring this to the attention of the judge. Although hearsay is admissible at these hearings, it is not as credible as firsthand knowledge. In many situations the individual who is testifying on behalf of the employer will have no personal knowledge of the events that took place with the claimant—it is therefore a good idea to point this out during cross-examination. (A common example is that

[40] Hearsay is admissible in DOL hearings, but it is given less weight than sworn, credible testimony. If, for example, your client and her employer's witness both testify to a set of events, but your client was the only one present, the ALJ must give the claimant's credible testimony more weight. In such a case, remember to mention during your closing that the employer's witness provided hearsay testimony while the claimant provided eyewitness testimony.

there will usually be an individual from the employer's human resources department present on behalf of the employer).

Some people view cross-examination solely as a chance to discredit a witness. Consequently, cross-examination will often be a good chance to introduce evidence that contradicts the witness's testimony. For example, an affidavit signed by someone on behalf of the employer or the summary statement taken by a Labor Service Representative may contradict the witness's testimony. While this is one potential goal of cross-examination, it is not the first one you should consider.

To plan the cross of any witness, ask yourself the following three questions: (1) Can I get anything helpful from this witness? (2) Can I limit the reach of her testimony? (3) Can I discredit the witness or her harmful testimony?

i. Can I Get Anything Helpful From This Witness? (Accrediting Cross)

There is no more credible way to prove a fact than through your adversary's witness. You must, however, judge her candor and motivation–if she seems committed to helping the employer, be more indirect in your questioning, or limit yourself to points that are so obvious that she cannot credibly deny them.

If you decide to seek helpful testimony from a witness, ask these questions in a friendly manner. This will lower the witness' suspicion of you and increase her willingness to cooperate. Always ask such helpful questions before you ask any confrontational questions. You can always get tough after starting out friendly, but it is harder to seem friendly after starting out tough.

ii. Can I Limit the Reach of Her Testimony? (Limiting Cross)

Often, your adversary will argue that a witness's testimony proves more than what the witness said. The ALJ may draw such inferences against your client unless you limit the reach of the testimony by sharply distinguishing between what it does and does not prove.

> Say, for example, that you represent Ms. Smith, a department store clerk who was fired for allegedly stealing merchandise. Your theory is that the employer cannot prove misconduct because they did not have sufficient reason to single out your client as the thief. The employer has no eyewitness to the theft. However, your client's former supervisor testifies that the merchandise disappeared from your client's work area while she was on duty. The employer wants the ALJ to infer your client's guilt from this coincidence, but you might limit the supervisor's testimony as follows:

Q: There were seven individuals besides Ms. Smith working in the store that day, right?

Q: And all seven of those employees have access to the store's various departments, isn't that right?

Q: And you have a number of customers going in and out of your store each day, don't you?

Q: Now you never actually saw Ms. Smith take the merchandise, did you?

Q: Nor did anyone else at the store?

By highlighting the limits of the witness's testimony, you show that that testimony isn't enough to prove that your client was the thief. An important thing to remember in cross examination is to resist asking for a conclusion. This is because asking for a conclusion, rather than implying one through factual questions, can be dangerous. In the above example, you might be tempted to ask a question like, "So, Mr. Supervisor, you really have no way of knowing that Ms. Smith was the thief, do you?" To which the supervisor could easily respond, "Actually, I do because the merchandise was in a locked drawer and only Ms. Smith had the key." In situations like this, asking for a conclusion or explanation can destroy your whole case – so resist the temptation.

iii. Can I Discredit the Witness or Her Harmful Testimony? (Discrediting Cross)

If the witness's direct significantly undermines your theory of the case, try to discredit the damaging testimony or the witness herself. There are numerous ways to discredit.[41] Here, in order of increasing difficulty:

- Show that the testimony may be based on a mistake in perception, interpretation, or memory.
- Show that the witness omitted certain facts in a way that made her testimony unfair or misleading.
- Make the witness unattractive by raising questionable behavior and goading her to act badly while testifying. [42]
- Show that the witness may be lying.[43]

There are three ways you can establish such discrediting facts.

1) You can attempt to get the witness to agree to the propositions you hope will discredit her. This is difficult to do unless you can conceal your objective from her. Any self-respecting witness will resist your efforts to openly discredit her.

2) You can turn this resistance against her with a more successful tactic: if you cannot get the witness to agree to what you want, get her to disagree in such an absolute or incredible way that the ALJ won't believe her. In the department store theft example, say you believe that the supervisor's theft accusation was a pretext. The supervisor was retaliating against your client because your client had recently gotten her into trouble with the store management. The supervisor will never admit such motivation, so you try to get her to deny it as incredibly as possible:

Q: Sir, my client recently reported you to the store manager for mishandling store inventory, didn't she?

A: Yes, but...

Q: And shortly afterwards, you did not receive a promotion you had sought to be an assistant store manager?

A: That doesn't have anything to do with this.

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[41] For more detailed discussion of each of these methods, see Amsterdam, Cross Examination, at 2-9.

[42] ALJs dislike employers who manipulate the circumstances of a claimant's termination to affect her eligibility for benefits. If you have evidence suggesting that the employer did this, raise the issue!

[43] In real life, unlike the movies, proving a witness to be a liar is extremely difficult. You should only attempt it when you can show both a motive to lie and solid evidence of untruthfulness, such as a recorded prior inconsistent statement. Because it is difficult to prove a witness is lying, you should focus instead on showing mistake through poor perception, misinterpretation, etc.

Q: Well, it must have created ill will between you and Ms. Smith, didn't it?

A: No, not really.

Q: Didn't it anger you that your subordinate may have cost you a promotion?

A: No.

Q: Not at all?

A: Not at all.

This is also an example of how to get the witness to say what you want by using a **false lead.** You frame the questions so that the witness thinks you are trying to get her to say one thing: here, to get her to change her story and admit her anger. She responds by repeating her story more and more absolutely, making it less and less credible–which is what you really want. At that point, don't argue the issue with the witness. You simply wait until your Closing Statement, when you argue to the ALJ that her claims contradict human nature and common sense. If you can get the ALJ to doubt the witness on one point, she may view her other testimony with skepticism as well.

3) You can get the witness to confirm related facts from which you can ask the judge to infer the discrediting facts. In our theft example, you could elicit the fact that no police report or charges were ever filed concerning the "theft," or that the incident occurred shortly after the supervisor failed to get her promotion.

B. Ask Your Client for Ideas

Always ask your client what to ask the employer and their witnesses. Since clients know more details about their cases, they often have great ideas for cross. During the hearing, if you are surprised by the testimony of an adverse witness, ask the ALJ for a brief recess after the direct. Discuss the matter with your client and formulate an appropriate cross.

If you need to revise your planned cross, even if you don't hear anything unexpected on direct, you may ask the judge for "just a moment" to revise and edit your cross questions. Don't be afraid to create a moment of silence: it builds drama and focuses attention on you.

C. Focus on Only a Few Specific Points, and Don't Repeat the Direct Examination

Always have specific purposes in mind when you cross examine, and do not try to do too much. Consider again the various possibilities to accredit, limit, or discredit the witness before you begin your cross, and pursue only the three or four specific points that are most important to your theory and have the greatest potential for success. Attempting any more than this lessens the impact of your cross and gives the witness more chances to hurt you. Avoid asking general questions that a witness can answer with a speech or lecture. General questions not only allow your witness to explain away any inconsistencies, but also give the witness the opportunity to bring in testimony that would otherwise be inadmissible.

A common error made by inexperienced cross-examiners is to repeat the direct, hoping to find something they can attack. This, however, only lets the witness repeat her harmful testimony and bores the ALJ. Avoid

this mistake by never undertaking cross without specific and limited purposes. **You don't have to cross-examine every witness, and if you can see no specific purpose for doing so, simply tell the ALJ: "No questions at this time, Your Honor."**

D. Avoid Making Petty or Trivial Points

Refrain from asking the witness petty or trivial questions – this tactic will only make you look unfocused. New advocates often feel that all inconsistencies should be raised during cross-examination, but this is almost never the case. Witnesses often make inaccurate statements during their testimony; only point these out when they help your claimant's case or where you are attempting to show that the witness's memory of events is generally faulty.

E. Plan To Make Your Strongest Points at the Beginning and the End

Your cross will be most impressive to the ALJ if you begin and end with strength. Therefore, plan to pursue what you believe will be your best two points at the beginning and the end of your cross.

F. Control the Witness Through Leading Questions

An adverse witness will hurt you if you give her the chance. Thus, on cross you always want to control her testimony and prevent her from volunteering statements that could harm your case. You can achieve this control by using leading questions. Make a statement and simply ask the witness to agree to it.

Focus the topic of each question on one narrow fact, so you can get the witness to answer only "yes" or "no": If you feel that the witness will not directly answer simply "yes" or "no" it can be very helpful to start your question by saying something to the effect of "now, this question will require only an answer of yes or no." An example — "Did you ever report the incident to the police—yes or no will be just fine sir." This is especially helpful with witnesses that seem to go on forever and try to talk their way out of the definitiveness of their answers.

For example, you could ask, "Isn't it true that you never reported the theft to the police?" Often, it is easier to get the witness to agree with the question if you leave off the "Isn't it true" part, and merely make a declarative sentence with a slight questioning inflection in your voice: "You never reported the theft to the police?" In any event, **do not** ask "why?" questions on cross or otherwise give the witness a chance to explain or elaborate. It only gives them an opportunity they will use against you.

G. Be Courteous to the Witness at All Times and Do Not Argue with Her

British barrister Clifford Mortimer aptly stated, "The secret of cross examination is not to examine crossly." When you seek to discredit a witness, do not show it in your attitude. Always treat her with courtesy, even if you think she is lying through her teeth. Doing otherwise only puts her on guard, making it harder to effectively cross-examine her. By contrast, being polite to the witness may relax her and consequently make her more likely to say something she hadn't planned to say in advance. You also want to avoid the perception that you are "picking on" a witness; it builds sympathy for her and makes you look bad.

Being courteous, however, does not mean retreating from your theory or relaxing your control. If a witness evades your question, point it out by saying "Perhaps I did not make my question clear. Let me ask it this way..." and repeat the question. If she evades again, say it again. The ALJ will realize who is causing the

problem. Politely but firmly limit the witness to the questions you ask. If she tries to elaborate, immediately ask the next question. Remember that it is your job to vigorously advocate for your client while trying to remain courteous and trying to avoid seeming like you are harassing the employer's witness. You will find that with certain individuals it is easier to get them "excited." For witnesses that seem cool and collected no matter what you ask them it is very important that you too remain calm. Showing your own frustration with answers that you may believe to be dishonest only makes you look bad. It is difficult to get what you want out of cross examination but staying composed is often even harder.

H. Pay Close Attention to the Witness's Answers

This may sound obvious, but during the hearing, it is easy to get so wrapped up in your questions that you pay insufficient attention to what is most important: the witness's answers. During your adversary's direct, focus your attention on the witness and jot down brief notes to keep track of her exact answers and potential subjects for cross that you had not anticipated. It is a good idea to write these down on a clean sheet of paper to keep your thoughts organized. If you are well prepared when it comes time for you to ask questions, you will be able to catch important facts and highlight them. A great technique for unanticipated questions is to begin your question by saying, "Ms…you just testified that…well, isn't it true that…" Also, pay close attention to how she answers your questions–you may get a better answer than you expected, but you will not be able to capitalize on it if you're already focusing on the next question.

I. Avoid Asking Questions for Which You Do Not Know the Likely Answer

A famous maxim of cross examination is that you should "never ask a question to which you do not already know the answer." This overstates the case slightly. It is always risky, and usually unwise, to "go fishing" for new facts from an adverse witness. In UI hearings, however, since you have little opportunity to discover the employer's case before the hearing, you may occasionally (although this scenario is extremely rare) want to ask such a question if the potential benefit seems strong. Take care, however, to limit your risk. Do not ask a question that can damage your entire theory if you get an unexpected answer. Never ask a critical question if you are not prepared to deal effectively with whatever answers you receive.

J. When You get a Bad Answer

When you get a bad answer from a witness, exercise self-control. Try not to hesitate or pause; instead, nonchalantly turn to another subject with a new line of questions as if the witness had said nothing important. The damage may already be done, but by moving on quickly its importance can be downplayed. In the event your client or witness produces a bad answer, don't forget you can rehabilitate the witness or client on redirect.

K. Never Challenge a Witness to Explain Weaknesses or Inconsistencies in Her Testimony

Never underestimate any witness's ability to explain away what seems to you to be the most hopeless of inconsistencies. If you give them the chance to get out of your trap, they will, so do not give them the chance. Again, just elicit the facts you need to show the weakness or contradiction and wait until your closing statement to make the point. This is a great example of why cross-examination is best limited to direct "yes" or "no" questions.

L. Know When to Stop

An otherwise-effective cross-examination can still backfire if you do not know when to stop. Stop cross-examining about a particular subject when:

- You have the facts you need for a good closing statement (i.e., you're on the verge of an ultimate question);
- You get a particularly good answer (to prevent her from changing or qualifying it);
- The witness sees where you are going, and seems ready to put up a fight; or
- Information harmful to your theory starts to come out.

If you get an extremely good answer, end your entire cross right then. This dramatically underscores the importance of the answer, and anything else you are likely to get would only be anticlimactic.

M. Be Mindful of the Judge

Never underestimate the effect a judge's questioning may have on your cross examination and your entire theory of the case. Often during hearings, judges may intervene with their own questions for a variety of reasons. Keep in mind the impact of an ALJ's questions, since they can often clue you in on points that the judge finds important or unimportant — points which you may want to reiterate or pursue during cross examination.

X. PREPARING THE CLIENT AND WITNESSES FOR THE HEARING: THE SECOND INTERVIEW

A. Meet Again with Your Client and Witnesses to Prepare Her for the Hearing

Most of the evidence presented to the ALJ is personal testimony. Thus, the decisive issue at any hearing is credibility.

To win the credibility issue, you must carefully prepare your client and any other witnesses. No matter how persuasive they may be one-on-one, they must be ready for the additional stress of appearing before a judge and opposing counsel. Meet with them before the hearing to rehearse the direct examination you have prepared, and the cross-examination you anticipate. Keep in mind that although the client may answer your questions well, most clients do not perform as well when questioned by the judge.

B. Interview Again to Nail Down the Facts

Begin by asking your client whether there is anything else about her case she has thought of since you last met. By this time, she may trust you more, and tell you more. Ask her again: is there anything else that her employer may bring up? Double check the key facts and clear up any uncertainties and impart to your client the importance of telling you the full story. Make sure that you have closely evaluated what information is in the client's Department of Labor file. If your client tells you one thing, but the file says that they have told the DOL something else, this is something that must necessarily be addressed and explained. The judge will ask the client questions about what she told the DOL, and if she testifies inconsistently, the judge will unfavorably assess the client's credibility. If the client wishes to testify differently than what they have told or written the DOL, there should be a valid explanation as to the reason for this inconsistency.

C. Calm Your Client's Nerves - Explain What The Hearing Will Be Like

Your claimant may be nervous. Many have not been to a DOL hearing before. Use the time at the end of your first meeting to calm their nerves. Assure the claimant that you will not allow the judge or the opposing party to intimidate them or coerce them into answering questions.

Explain what the hearing room looks like and that it is not a court room. The hearing is held in a small office with a table that seats four to five people, and the judge's desk at one end of it. You will be seated next to her, with her employer across the table. The hearing will be tape-recorded, so remind the claimant to speak loudly and clearly.

The format of the hearing is as follows:

- ALJ gives a short opening statement, confirming all parties are present, have all documents and are ready to proceed
- Party with burden of proof testifies (employer will testify first in misconduct cases, claimant will testify first in voluntary quit cases. In a reopening case, the party who reopened will testify first on the threshold issue of reopening.)
- Cross examination of person who testified.
- Other witnesses for first side testify.
- Cross examination of those witnesses.
- Responding party testifies
- Cross examination of responding party.
- Other witnesses for responding party testify.
- Cross examination of responding party's witnesses.
- Both parties make closing statements (usually employer first).

Keeping answers as direct and simple as possible are important for calming your client's nerves, as well as making the hearing easier for the judge. In this vein, the ALJs usually do much of the questioning themselves. Clients are permitted to bring notes (not a prepared statement) if it will help calm their nerves, but a client cannot read from the notes while testifying. They may only refer to the notes to refresh their memory.

Witnesses do better when they understand what their advocates are trying to prove. Therefore, explain your theory of the case in simple terms: what facts you want to prove, and why they are important. Also, explain the law. In unemployment hearings for misconduct cases the judge will be concerned about the last incident that caused the employer to fire the claimant, and in voluntary quit cases the judge will be concerned about that last thing that caused the claimant to leave her job.

D. Prepare Your Client for Direct Examination

The ALJ will likely ask questions of your client before allowing you to do so. Therefore, you must prepare your client for the various questions the ALJ might ask and how those questions may be worded. Have her answer each question in her own words and discuss her response. If she answers as you wanted, point out why her answer was good, and urge her to repeat it at the hearing. If she does not answer well, describe why, remind her of what she previously stated and explain why the ALJ will be asking such a question. Review this until your client feels comfortable with her answers.

Also watch for any attitudes or mannerisms that could look bad at the hearing (e.g., short temper, speaks too softly, doesn't make eye contact) and work on these as well. In cases that were adjourned or are being reopened (but the claimant had attended the first hearing), you can find out how your client will perform in the hearing by listening to the tape of the first hearing. The tape is in the client's file, which is available at the Department of Labor.

PRACTICE. PRACTICE. PRACTICE. Without proper, thorough, and thoughtful direct examination your client will lose. The single most important thing you can do to prepare for direct is to rehearse. Meeting in person is ideal. If you cannot get together with your client, you can rehearse over the phone. Prepare your questions and ask them as if you were in the hearing in front of the judge. Be as formal as possible so your client can get used to the process and tone of the hearing. Ask your questions and stop whenever your client has given a different answer then you expected. This can happen for a few reasons:

1. The client is nervous.
2. The client is trying to be eloquent and, in the process, changed his story.
3. The client is unknowingly caught in a lie.

You cannot tell your client what to say. You can, however, go over the information revealed during the initial interview. This process requires some finesse and will change with each client. The bottom line is: practice makes perfect.

E. Prepare for Admitting Evidence

It is important to explain to your client how you will enter documents into evidence on her behalf. It is helpful to practice this so that it goes smoothly during the hearing. To enter documents into evidence in a direct or cross examination it is advisable that the documents fit into your line of questioning. To enter documents into evidence:

- Tell the judge what document you will be referring to. Make sure the judge has the document (be sure to always bring three copies to the hearing) and ask the judge to mark the document for identification. This does NOT mean that the document is entered into evidence yet until the judge confirms it has been entered into evidence as hearing exhibit (X).
- Ask your client:
    - Do you recognize this document?
    - Can you tell us what it is?
    - Can you explain to us its relevance? (The client cannot read from the document but can explain what the importance of it is – e.g., this document shows that I in fact did attend work on September 28, 2009)
- Finally, after laying the foundation, ask the judge to please enter the document into evidence. The judge will show or reference the document to the employer and ask them if they have an objection. At that point the employer will be allowed to comment on the document. She will then ask you if you have an objection. If the judge accepts the document into evidence, she will call it Claimant's exhibit {number or letter}. Objections: use them or lose them! If you do not object, your right to oppose the document is lost for appeal.

Also, please do not forget to bring two additional copies of the document to the hearing. One copy is given to the employer and the other to the judge. If additional copies are not brought, the judge will have to make them at the end of the hearing and that will reflect poorly on your performance and preparation.

F. Prepare for Hostile Direct by the ALJ, and Cross-Examination by the Employer

The thought of tough questions from a judge or ex-employer makes clients nervous. Reassure your client that you will be there to stick up for her and tell her that the best way to be ready for such questions is to discuss them now. Make sure that the client understands that you are not crossing her because you do not trust or believe her but because you want to prepare her for the employer's questioning.

You can anticipate much of the employer's cross by thinking about what the employer told the DOL, what your client expects them to argue, and what they need to prove their theory of the case. Also take a critical look at your theory. Identify its "weakest links." These may be targets of the ALJ's direct and the employer's cross.

Pose each tough question you anticipate to your client. Help her think through the best honest response that is consistent with your overall Theory. **Emphasize that she should always tell the truth, and not be afraid to admit her own mistakes**. No one is perfect, and a witness who is willing to admit her own errors is more credible than one who pretends to be blameless. However, the witness should not be so forthcoming as to admit fault.

Tell your client always to take her time in answering any question, whether it be from the employer or from the judge. This gives you extra time to object if the question is improper and helps her formulate a better answer.

Employers may suggest that you "coached" your client into giving the "right" answers. If this situation occurs, you may object to this line of questioning. If the judge allows the client to answer, one of two things may occur: your client may give an answer that is satisfactory, or there is an issue with your client's answer. Remember, you always have a right to redirect, at which point, you should rehabilitate the client.

G. Advise Your Client How to Dress, Speak, and Act at the Hearing

The ALJ judges credibility not just on what your client says, but also on how she says it, how she looks, and how she acts. Hearings can now take place over WebEx, therefore, the judge and employer can now see you and the claimant. Therefore, stress that she must:

- Dress for the hearing as if going to a job interview.
- Take her time answering and speak loudly and clearly.
- Look at the ALJ, not you, when answering all questions.
- Stay calm no matter what anyone else says or does, and politely but firmly stick to her story.
- Not interrupt the ALJ.
- Always respect the ALJ.

If your hearing is via telephone, there are other considerations to go over with your client:

- Remind your client to speak loudly and clearly. The hearing is recorded, and they are speaking through a phone.
- Speak when spoken to – over the phone, it can be difficult to tell when someone is getting ready to speak or answer a question. Let your client know that there is no reason for them to speak unless they are responding to a question from the ALJ, you, or opposing counsel. Relate the hearing to a conference call – with overlapping voices, no one is heard.
- If they are using a cell phone, be sure that the claimant is located somewhere quiet with good cell phone reception and a charged battery. The best place to participate in a hearing is an apartment / home, but a room in the library could also work.
- Advise your client that, unlike an in-person hearing, a phone hearing only allows the judge to hear their voice, rather than see the claimant is properly dressed or sitting appropriately. Be sure to amplify the importance of speaking loudly, clearly, and calmly – this is the claimant's best and in a phone hearing, only way to demonstrate credibility.

XI. THE HEARING: MAKING OBJECTIONS AND DEALING WITH THE ALJ

A. In the Waiting Room

Claimants must call or log in to the hearing at least 5 minutes prior to the start of the hearing. They should have their hearing file in front of them and remain prepared for the judge to start the hearing.

Most ALJs allow for at 5 minutes to pass before starting the hearing. Still, it is imperative to be on time and prepared. If your claimant is running late, you can respectfully ask the judge for some additional time. Most hearings last about one hour, but if there are complex issues or additional witnesses, be prepared for a longer hearing. If the hearing goes on for over 2 hours with no hope of completion, the judge is likely to adjourn to continue the hearing another day.

If the claimant requested the hearing and the employer does not appear, the ALJ will proceed with the hearing, take testimony from the claimant, and decide based on that testimony. The employer can apply to reopen the case. If granted, the employer must show good cause for his failure to appear.

If the employer requested the hearing (therefore the claimant has already received or is receiving benefits), and the employer fails to show, the ALJ should sustain the initial determination that was in your client's favor. The claimant will receive a notice that she won due to the employer's default.

B. Beginning the Hearing

It's quite normal to be nervous before a hearing but try not to show it. The ALJ will give you no more respect than you seem to think you deserve, and your client will be more confident if you are.

If the employer is represented by an attorney or a hearing representative firm (TALX, ADP, Equifax, UCC, etc.), or by a Commissioner of Labor representative, prepare for a full-blown hearing. If the employer appears unrepresented, remain vigorous in your advocacy, but perhaps tone it down a bit, so you do not build sympathy for your unrepresented opponent. Finally, if the employer does not appear at all–which frequently happens–cut back your presentation to the essentials. Be attentive in these situations to what the ALJ seems most concerned with. You will probably win unless the ALJ finds your client unbelievable. Don't antagonize her with long proofs of uncontested issues.

If you need to sequester employer witnesses, have a phone witness, or want to ask for an adjournment or subpoena, bring it up at the beginning. Briefly explain the importance of your request. If the ALJ turns you down, renew your request later in the hearing when relevant - the Judge may better understand what the case requires.

The ALJ decides the case, so try to establish good relations whenever possible. ALJs, however, don't always respect a claimant's rights, and your job is to protect your client's rights, even if that puts you at odds with the ALJ.

In misconduct cases the employer presents their testimony first, while in voluntary quit cases, the claimant proceeds first. The Judge often directs who goes first based on the issue and who called the hearing. Remember, no matter who speaks first, you and your claimant have the right to a direct and cross-examination of all witnesses for ALL issues. A cross-examination problem arises occasionally when a claimant's hearing was adjourned, and you were not present at the first hearing. If an employer's witness testified at the first hearing, is not present, and is not available for cross-examination then be sure to remind the judge in your closing statement that that witness's testimony should not be considered when arriving at a decision because you were not given the opportunity to cross-examine that witness.

XII. OBJECTIONS

A. Identify Objections Before the Hearing and Object During the Hearing

Because UI hearings are administrative hearings, the ALJs and Appeal Board are not bound by formal rules of evidence. They focus not on excluding evidence, but on weighing each piece to determine what it is "worth." Objections, however, are still important. Some evidence may still be excluded if you object. Even if the ALJ does not exclude the evidence, a well-spoken objection may persuade the ALJ to give it less "worth."

Plan objections as part of your hearing preparation. Imagine what questions the employer is likely to ask on direct and cross to prove their theory. Also consider the answers their witnesses are likely to offer. Identify objections you could make to these questions and answers. By thinking about this before the hearing, you will recognize objectionable material and object faster during the hearing. Most ALJs recognize the following objections to varying degrees:

i. "Irrelevant"

A question or answer is irrelevant if it does not help determine any fact which affects your client's eligibility for benefits. ALJs interpret relevance broadly, but the following examples are irrelevant:

- Your client's job performance if the issue is whether she had good cause to quit.
- Incidents after her job ended.

During cross, if you can't tell what the questioner is driving at, object to relevance – the resulting argument often gives the answer.

ii. "Leading" (direct and redirect only)

A leading question "puts words in the witness's mouth" by suggesting the answer desired or assuming a "fact" which the witness has not yet stated. The "question" is really a statement which the witness can only affirm or deny. Such questions tend to control the witness; thus, they generally are not allowed on direct and redirect examination.

iii. "Witness lacks personal knowledge" or "Calls for a conclusion"

A witness cannot testify about things she has no way to know. For instance, an employer cannot testify to what your client thought or felt.[44] The employer may think she can figure out what your client felt ("I knew she was angry because she ignored me"), but such conclusions are subjective inferences, not first-hand perception. The ALJ is supposed to draw such conclusions, not the witness.

iv. "Misstates the prior testimony"

Particularly during cross, the questioner may misrepresent what a witness said earlier. Pay attention whenever a questioner refers to previous testimony, and object if the questioner distorts it.

v. "Asked and answered"

The questioner may try to ask your witness a question more than once to elicit a different response. If you know your client has answered the question, object to it being asked again or in a slightly different way.

vi. "Arguing with the witness" or "Harassing"

This applies when an employer or ALJ debates the facts with the witness or otherwise abuses her.

vii. "Document speaks for itself"

This applies when the witness attempts to read from a document. Reading aloud from a document in evidence is redundant, and witnesses should speak in their own words.

viii. "Objection" (general objection)

If anything strikes you as unfair, but you can't cite a specific rule to back you up, object anyway, and explain your reasons. Even if you can't put your finger on the exact rule being violated, your job is to get an objection on the record. In many situations, there is no exact rule: the ALJ simply does what seems fair. Again: use it or lose it! It is better to object "generally" than to lose the ability to do so on appeal.

B. The Purpose of Objections

Don't object to unimportant or introductory matters–remember each side's theory of the case and focus your objections on questionable attempts to prove key facts. Remember that except for leading questions, which ALJs can always ask, every objection noted above applies to ALJs as well as employers.

[44] Most ALJs accept hearsay "for what it's worth." (Hearsay is an out-of-court statement offered for the truth of the matter stated). But see ; Matter of Perry, 325 N.Y.S.2d 888.

You should also use objections to protect your client from hostile examination. If the ALJ or employer is bearing down hard, do be persistent with your objections. You can also object to a question as "unclear" to signal to your client that the question is tricky.

C. Object Immediately When You "Sense" Something Wrong with a Question or Answer

You need to react fast to make effective objections. In most cases, you will vaguely "sense" that a question or answer is somehow wrong a moment before you can articulate just what about it is wrong. You will improve your speed with objections if you let that first vague "sense" be your trigger to say "Objection!" Then, begin explaining why you object. It may take a second, but verbalizing it "on your feet" will usually remind you of the rule you are looking for. If you draw a blank, make a general "unreliable" or "unfair" objection. Your speed and skill with objections will improve with experience and understanding of the possible objections.

Pro tip: It's helpful to explain the concept of objecting to the client, so they know not to answer IMMEDIATELY and to give you a half-second to hear the whole question. I find telling claimants to take "a beat or a Mississippi" before answering questions helps to slow them down and think about their answer, but also helps avoid a claimant half-answering a question before you can get the objection out.

D. Objections or Comments Regarding Documents Entered into Evidence

You have a right to see any document before it is accepted as evidence –ask for a copy of anything the employer refers to or seeks to introduce. If it is completely new to you, take a recess to review it if necessary. Look it over carefully (don't be rushed), and object if it is ambiguous, altered, or does not show what they say it shows. You may also ask the employer questions about any document which they wish to bring into evidence.

For the most part, although the ALJ will ask both sides if there are any objections or comments to the document being entered as evidence, most documents will be entered. You can, however, note for the record any dissatisfaction or concern you have about the documents. For example, you may object because:

- "My client has never seen this document."
- "My client was forced to sign this document."
- "This is a warning letter which my client has never signed."
- "This document was created X days after the incident in question, and is highly untrustworthy."
- "The employer is present, so the summary of interview forms filled out by DOL personnel are unnecessary hearsay."
- "Those written affidavits in lieu of testimony are not the best evidence because live testimony is available."

Hearsay is allowed into evidence in administrative hearings and given the weight the judge deems it's worth, though a judge may refuse to hear testimony because it's hearsay. Also remember that hearsay comes in paper form. Make note of when it was written, to and by whom. If the documents in the file are hearsay, or are objectionable for any reason, bring these to the attention of the ALJ - even if they are not mentioned directly during the hearing (the judge is still going to be looking at them during their review of the case).

E. Don't Be Intimidated by the ALJ

If the judge is antagonistic toward you or your client, or just in a bad mood, be respectful but **stand your ground**. Don't let any ALJ bully your client or bully you into forfeiting your client's rights. If you make a reasonable request or objection and the judge jumps down your throat, explain your position calmly but firmly. If this gets you nowhere, note your objection for the record, and be ready to object again if needed–don't be intimidated!

F. Take Note of What the ALJ Considers Important

Even though you should never let an ALJ bully you, you can make your advocacy more persuasive by noticing what the ALJ seems to find important and adapting your arguments to address these points. Note where she focuses her questions: these are the key factual issues you must address. Also watch her reaction to testimony: if she takes particular interest in a point, emphasize it in your closing statement. By making "in-flight" adjustments to your arguments so they are responsive to her concerns, you make it easier for her to accept your overall Theory.

G. Keep Your Arguments Brief

The ALJs are under administrative pressure to resolve cases fast. As a result, many are impatient, and some act "bored" just to try to speed you up. You must strike a balance: don't let the ALJ rush you into skipping important points, but don't go beyond what you need to prove your theory. Make everything as easy as possible for the ALJ. Provide copies of all information and documents; keep answers and questions to the point.

H. Request a Recess or Adjournment if Anything Unexpected Occurs

Seek a recess to confer with your client if anything important comes up unexpectedly (e.g., they claim your client did something which she hasn't previously told you). If you can't develop an adequate response during the recess, request an adjournment to another date.

The ALJ might adjourn the case for a different issue or the production of another piece of evidence regardless of whether you have requested an adjournment. If you are confident the ALJ has sufficient evidence to make a favorable decision for your client and the claimant is not currently receiving benefits you should object to the adjournment because it prejudices your client. Nevertheless, you should be ready to inform the ALJ of any dates over the next four to eight weeks that are inconvenient for you and your client should the case be adjourned.

I. Conclude With a Brief, Persuasive Closing Statement

When you discuss the law, do not lecture the ALJ. Rather, treat it like shared knowledge discussed by two insiders: **"As you know, Judge, the Appeal Board has held ...."** You only need to cite specific cases in unusual situations. Your Closing Statement should take no more than 2-3 minutes–the shorter, the better. Since most unemployment cases turn on disputed facts, your closing statement should emphasize specifically why your client's account is more credible than that of the employer. This is also your opportunity to cite supporting case law – be prepared to give the judge copies of any case cited.

The ALJ will not inform you of the final decision at the end of your hearing. The ALJ reserves the right to make her decision on all issues and provide written notice of her decision within ten days.

XIII. POST HEARING RESPONSIBILITIES

A. The Decision

Once the hearing is over, tell your client that she should receive a decision in two weeks.[45] If two weeks pass without a decision, call your client, and then perhaps the hearing site if the client hasn't received the decision either. If you submitted a Notice of Appearance, you should receive a copy of the decision as well. Once you or your client receives the decision, you should notify VOLS of the decision.

If the claimant wins, she will start receiving benefits in one to two weeks (but may have to repay them if she loses on appeal). If the claimant loses and an overpayment was at issue, the claimant can usually work out a very reasonable repayment plan with the DOL, and you should make sure that she knows this.

Note: You are not a financial advisor and have limited knowledge of the claimant's financial situation. If the claimant expresses an inability to repay or their overpayment is over $10,000, reach out to VOLS for referral resources.

B. Reopenings

Parties who are absent from a hearing with good cause will ask the Appeal Board to reopen, rather than appeal, the decision.[46] If the ALJ proceeded without the employer, the employer may request a reopening within a "reasonable time" after receiving the decision.[47] A reopening is just like a new hearing, except that the party making the request must first show that they had a good reason for missing the last hearing in order to show good cause to reopen the case and get to the merits. If the employer doesn't appear at the hearing, let your client know that the case may be reopened – and ask her to call you if she receives a notice that the employer has requested a new hearing. If you are on record as the claimant's representative, you should also receive notice of any further hearings. "Good cause" to reopen a hearing could include lack of notice, lack of representation or inadequate time to collect necessary documentation.

C. Appeals

Any party who loses a hearing before an ALJ has the right to appeal the ALJ's Decision to the Unemployment Insurance Appeal Board.[48] The Appeal Board, despite its name, does not function like an

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[45] In practice, most decisions are issued much sooner, sometimes within a week.

[46] See In Re Green, 914 N.Y.S.2d 456, 458 (2011). Parties other than the Commissioner of Labor must have appeared at the ALJ hearing before they may appeal that decision to the UI Appeal Board. See 12 NYCRR § 463.1.

[47] **Any party that does not attend a hearing may request a reopening** within a reasonable time. A third request to reopen will be referred to the Appeal Board. Administrative Law Judges generally grant a third leave to apply to reopen.

[48] N.Y. Lab. § 621 (McKinney 1991); 12 NYCRR § 463.1.

appellate court because the Appeal Board owes no deference to the decision rendered by an ALJ: **the Appeal Board has the power to reverse *any* finding of fact or conclusion of law reached by an ALJ**.[49] This includes credibility determinations. Thus, no hearing outcome is certain until the losing party decides whether to appeal. An appeal should be treated as seriously as the original hearing.

i. The Decision to Appeal

Your client has an absolute right to appeal the ALJ decision, but you (or VOLS) are not required to represent her on appeal. However, if you have the time and feel the ALJ decided wrongly, you may wish to continue representation. Consult your mentor if you are unsure whether to appeal. If you decide not to represent your client on appeal, be sure to **notify your client as soon as possible**. Advise her that she can appeal on her own and tell her how to request a transcript and an extension. Also notify the VOLS office of your decision **not** to assist on the appeal. Important: if you are not going to represent the client in the appeal, make sure to tell the client they have a 20-day window from the date the decision was made to appeal the ALJ decision.

If you wish to continue appeal, you must inform VOLS. VOLS will provide you with our VOLS Appeals Manual, which will direct you toward helpful resources and fill you in on substantive and procedural requirements. You must have a mentor read over your brief before it is submitted to the DOL. This means having the brief done several days early to give your advisor time to review and discuss it with you.

Further information on appeals can be obtained from the VOLS website.

ii. Important Appeal Deadlines

You have 20 days from the date of an adverse ALJ decision to submit a letter to the DOL indicating your intent to appeal. A form letter is available with VOLS for this purpose.

Once the DOL receives your letter, it will send all parties a Notice of Receipt of Appeal. You have 7 days from the date of this notice to submit a letter requesting production of the written transcript of the hearing. If you used the VOLS form letter to request your appeal, the request for a transcript is included in your request for appeal. If, for some reason, you request the transcript in a separate letter, you should also request that your appeal brief be due no earlier than 20 days from the date that you receive notice that the transcript is available.

iii. Employer or Commissioner of Labor Appeals

If you receive Notice indicating the employer is appealing a case you won, you again have 7 days to request production of the transcript.

If the employer submits any briefs or papers for consideration by the Appeal Board, and you have 12 days from the date they mailed it to submit a reply to their papers, if you so desire. Many employers, however, appeal without submitting any papers, so don't count on being able to put all your arguments into a reply – file your own brief within the 20 days after the transcript becomes available, and then see if the employer files anything that requires your reply.

For more information on Appeals - see the VOLS Appeals Manual.

[49] N.Y.Lab. § 622 (McKinney 1991); 12 NYCRR §§ 463.2(a) to (c) and 463.3.

XIV. REFERENCE MATERIALS

A. Useful Contacts

The Department of Labor

UI Appeal Board, Administrative Law Judge Section:
(For adjournments, case status inquiries, notices of appearance, subpoena requests, and applications to reopen. Contact the Brooklyn office if you do not know the hearing location.)

250 Schermerhorn Hearing Office: Telephone: (718) 613-3500
Fax: (718) 613-3566

UIAB Administrative local office emails:

Brooklyn:	brooklynhearings@uiab.ny.gov
Garden City:	gardencityhearings@uiab.ny.gov
Hauppauge:	hauppaugehearings@uiab.ny.gov
Menands (Capital District):	menandshearings@uiab.ny.gov
Buffalo :	buffalohearings@uiab.ny.gov

UI Appeal Board, Appeal Section:
(For appeal status inquiries.) Telephone: (518) 402-0205
Fax : (518) 402-6208

B. Sample Letters

(Sample Request for Subpoena for Law Firm Participants)

Date:

To: Presiding Hearing Officer
From: Your Name
Name of Firm (or "Volunteers of Legal Service" if not affiliated with a firm)

Re: Claimant's Name
Case Number

REQUEST FOR SUBPOENA

On behalf of the claimant, Mr. _____, I request that the following materials be subpoenaed for the hearing in the above referenced matter on (date of hearing) at (time of hearing):

1. **Surveillance camera tapes dated 06-04-09.** Mr. _____ denies having eaten in the lab on that date, except in the designated eating area. The memorandum which the employer submitted for inclusion in the case file offers to produce the tapes: "A selection of tapes should be saved if this ever needs to be documented." (see case file). Since all parties agree that the tapes could settle this matter definitively, the tapes from that date should be subpoenaed, along with the appropriate equipment necessary to view them in the presence of a hearing officer.

2. **Mr. _____'s last work review.** Not long before his discharge, Mr. _____ was given a very favorable review by his superiors. The review contained none of the criticisms which the employer now alleges had been going on for a long time. Mr. _____ read the review and signed it, but was not given a copy. It is therefore necessary to subpoena the employer's copy of that review.

These materials will help clarify this case and allow for an easy resolution of the issues in dispute.

Sincerely,

Your Name
Claimant's Representative
Firm Name (or VOLS)

(Sample Letter to Employer Requesting Documents for Law Firm Participants)

(DATE)

(Name)	OR	(Employer's Representative)
Human Resources Department		(If the Employer is represented)
Company Name		Firm or Company Name
Address		Address
New York, NY		New York, NY

Re: Claimant's Name
Case Number _____

Dear _____,

I am writing on behalf of _____ as his unemployment insurance claims representative. In order to prepare for next Monday's hearing, I would like to review any documents you may have on file regarding Mr. _____'s discharge. I am particularly interested in written statements made by Mr. _____'s co-workers who were with him when the relevant incidents occurred, as well as statements by his supervisor and by_____ who witnessed the alleged misconduct.

We would also like copies of records or documents pertaining to the investigation of the incident.

Please send the requested materials by fax as soon as possible. My fax number is _____. If you prefer, I could arrange to come to your office to collect the documents. Feel free to call me and leave a message at (212) 555-5555. In any event, I will call on Thursday morning, June 9, to discuss arrangements for collecting the documents.

Thank you in advance for your cooperation.

Sincerely,

Your Name
Claimant's Representative
Firm Name (or VOLS)

(Sample Notice of Appearance to the Unemployment Insurance Appeals Board)

STATE OF NEW YORK UNEMPLOYMENT INSURANCE DIVISION
ADMINISTRATIVE LAW JUDGE SECTION

In the Matter of the Claim for Benefits Made By _____ Claimant	**NOTICE OF APPEARANCE** S.S. # XXX-XX- _____ A.L.J. Case #:_____

Please take notice, that the claimant, _____, appears in this proceeding by her/his duly retained and authorized representative _____, as part of the VOLS Unemployment Insurance Advocacy Project in conjunction with the Department of Labor's *pro bono* initiative and that such authorized representative demands that copies of all subsequent notices and decisions be served on her/him at her/his mailing address at

_____

_____

_____

Please note that (*name of authorized representative*) is not available on _____.

_____

Claimant's Representative (*signature*)

Dated:

(Sample Notice of Appearance and Request to Re-Open to the Unemployment Insurance Appeals Board)

STATE OF NEW YORK UNEMPLOYMENT INSURANCE DIVISION
ADMINISTRATIVE LAW JUDGE SECTION

In the Matter of the Claim for Benefits Made By _____ Claimant S.S. # XXX-XX- _____	**NOTICE OF APPEARANCE** & **REQUEST FOR HEARING** A.L.J. Case#: _____

ON BEHALF OF CLAIMANT,_____ , we request to schedule a hearing to present claimant's case before an Administrative Law Judge. Claimant disagrees with the DOL Determination and would like to present his/her case before an impartial judge. Please take notice, that the claimant, _____, appears in this proceeding by her/his duly retained and authorized representative _____, as part of the VOLS Unemployment Insurance Advocacy Project in conjunction with the Department of Labor's *pro bono* initiative and that such authorized representative demands that copies of all subsequent notices and decisions be served on her/him at her/his mailing address at

_____

_____

_____

Please note that (*name of authorized representative*) is not available on _____.

_____

Claimant's Representative (*signature*)

Dated:

C. Checklist

Step-by-step checklist for handling unemployment insurance pro bono matters:

- ❑ Contact the claimant as soon as possible and set up your first meeting.
- ❑ Fax a Notice of Appearance to the Department of Labor (including any dates of unavailability).
- ❑ Ask the claimant to sign your firm's retainer letter.
- ❑ Review claimant's file from the Department of Labor (available once a hearing date has been set).
- ❑ Research the case if necessary and develop your case theory.
- ❑ Talk to your mentor or advisor about the case.
- ❑ Prep your witness(es).
- ❑ Represent your client at the hearing.
- ❑ Tell your client to call you when they get their decision in the mail.
- ❑ Scan and e-mail the ALJ's decision to VOLS.