STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

UNITED FARM WORKERS OF AMERICA, Petitioner Labor Organization, and **WONDERFUL NURSERIES, LLC**, Employer.	Case No. **2024-RM-002** **ORDER GRANTING IN PART AND DENYING IN PART APPLICATIONS FOR SPECIAL PERMISSION TO APPEAL INVESTIGATIVE HEARING EXAMINER RULINGS ON ATTORNEY-CLIENT PRIVILEGE AND ATTORNEY WORK PRODUCT** **Admin. Order No. 2025-02** (May 16, 2025)

Wonderful Nurseries, LLC (Wonderful) has filed two applications for special permission to appeal (appeals) requesting interlocutory review of a series of oral rulings and a written order issued by Investigative Hearing Examiner Miles Locker (IHE) in this majority support petition (MSP) case involving Wonderful and petitioner United Farm Workers of America (UFW). The UFW filed a motion to strike the first of Wonderful's appeals and Wonderful filed an opposition to that motion. The UFW also filed an opposition to Wonderful's second motion. Wonderful sought leave to file a reply to the UFW's opposition, which the UFW moved to strike. The Board denies the UFW's motion to strike Wonderful's request to file a reply but finds further briefing is not necessary and denies Wonderful's request to file a reply. (Board Reg. 20242, subd. (b).)

The Board has considered the appeals, the motion to strike, and the

arguments and evidence submitted by the parties. As to the first appeal, the Board denies the UFW's motion to strike but finds Wonderful's motion was untimely filed as to the challenged ruling that occurred on March 11, 2025.[1] With respect to the challenged rulings that occurred on March 12, the Board reverses the IHE's rulings with respect to witnesses Liliana Del Aguila and Yaqueline Aragon and sustains the IHE's ruling with respect to witness Ana Saldivar. As to the second appeal, the Board reverses the IHE's ruling concerning application of the "crime/fraud" exception to the attorney client privilege and work product doctrine predicated on the commission of an unfair labor practice.

Background

A lengthy hearing concerning Wonderful's objections to the certification of the UFW is ongoing. The UFW is putting on its rebuttal case and, among the evidence being presented is evidence concerning Wonderful's collection of declarations from its employees. In December 2024, the UFW sought records from Wonderful via a notice in lieu of subpoena (subpoena). The UFW sought documents including those relating to the preparation of statements or declarations from Wonderful employees, including written notes, drafts, emails, and other communications concerning such declarations. Wonderful petitioned to revoke the subpoena, asserting the attorney-client privilege and attorney work product objections with respect to the above-described categories but stating that it would provide some responsive documents.

[1] All subsequent dates are in 2025 unless otherwise noted.

In its opposition to Wonderful's petition to revoke, the UFW asserted the records sought were unprotected by the attorney-client privilege and work product doctrine under the "crime/fraud" exception insofar as Wonderful and its attorneys were engaged in a violation of the Agricultural Labor Relations Act (ALRA or Act) and presented falsified or perjured declarations. (See Evidence Code, section 956 [crime/fraud exception to attorney-client privilege]; Code of Civ. Proc. (CCP) 2018.050 [crime/fraud exception to work product protection].) Wonderful disputed the application of the crime/fraud exception but represented it would produce documents, including documents provided to employees and drafts of statements or declarations signed by employees.

On February 20, the UFW filed a motion in limine that sought to preclude Wonderful from asserting the attorney-client privilege and attorney work product doctrine with respect to adverse witnesses called by the UFW. The UFW again invoked the crime/fraud exception along similar lines to those presented in connection with the petition to revoke. Wonderful continued to oppose application of the crime/fraud exception.

The hearing was in recess between late February and mid-March. At the time the hearing resumed on March 11, rulings on the petition to revoke and the motion in limine were still pending.

As the hearing commenced on March 11, the UFW made an oral motion with the IHE for production of "what is a template declaration" that was used by "all declaration takers." The UFW contended the template was responsive to the subpoena and was necessary to establish that the declarations were "fabricated." Wonderful opposed the motion on privilege and work product grounds. It acknowledged multiple drafts or versions of the template

document existed and represented that they consisted of "rather simplistic opening paragraphs and ending paragraphs" but did not constitute a "draft" declaration and was not responsive to the subpoena.

The IHE made an oral ruling directing production of the template declaration. The IHE found that the template was reasonably embraced within the scope of the subpoena. With respect to Wonderful's objections, the IHE applied the exception to the protection of "qualified" work product under which production may be required where denial would "unfairly prejudice the party seeking discovery in preparing that party's claim or defense or will result in an injustice." (CCP § 2018.030, subd. (b).) Wonderful refused to disclose the document and stated it intended to appeal the matter to the Board.

The following day, March 12, the UFW called several adverse witnesses to testify. Two of these witnesses, Liliana Del Aguila and Yaqueline Aragon, were paralegals employed by the Roll Law Group, a law firm representing Wonderful, who were tasked with collecting declarations from employees. Both individuals were asked about communications they had with Wonderful attorneys prior to collecting declarations. Wonderful asserted privilege with respect to these questions. The IHE overruled the objections and Wonderful instructed the witnesses not to answer.

Also on March 12, the UFW called Ana Saldivar, who worked in Wonderful's human resources department. Saldivar was questioned concerning communications she had with Raul Calvo, a non-attorney labor consultant retained by Wonderful, during a meeting she and Calvo attended, which also included two Wonderful attorneys. Wonderful's privilege objection was overruled by the IHE and Wonderful instructed Saldivar not to answer the

question.

On March 14, the IHE issued a written order on the UFW's motion in limine. As will be described in more detail below, the IHE found the "crime" prong of the crime/fraud exception could be applied based upon *prima facie* evidence that Wonderful's conduct concerning the collection of employee declarations constituted an unfair labor practice. This applied both to claims of attorney-client privilege and work product protection. The IHE found there was *prima facie* evidence that Wonderful committed an unfair labor practice by providing unlawful assistance to employees in revoking their authorization cards. While the IHE denied the UFW's motion in limine to the extent it sought a blanket ruling on all claims of privilege, he indicated he would evaluate privilege objections based upon the framework set forth in his ruling. He also stated he would consider application of the "fraud" prong of the exception if there were evidence presented that Wonderful knowingly submitted false declarations, although he found insufficient evidence in the record to support such an application at that point.

On March 19, Wonderful filed the first of the two special appeals presently at issue. There are four rulings identified in the appeal: 1) the March 11 oral ruling concerning the "template declaration;" 2) an oral ruling on Wonderful's privilege objection during the testimony of Del Aguila; 3) an oral ruling on Wonderful's privilege objection during the testimony of Aragon; and 4) an oral ruling on Wonderful's privilege objection during the testimony of Saldivar.

On March 27, the UFW filed a motion to strike Wonderful's appeal of the IHE's oral orders. The UFW argued the appeal was untimely and was not supported by evidence as

required under the Board's regulations. The UFW did not submit any substantive arguments in response to the appeal but argued the appeal is "garbled, ambiguous, convoluted and unclear," making a response "virtually impossible." The UFW argued Wonderful should be required to provide the full day's transcripts for any rulings it was challenging and the UFW should be given additional time to file a response. Wonderful opposed the motion to strike, arguing that, by calling witnesses prior to the issuance of a written order on the motion to strike and motion in limine, the UFW created a "chaotic" situation and, in any event, the IHE's March 14 written order "engulfs his oral rulings both before and after the Order was issued."

On March 21, Wonderful filed its second special appeal, which challenges the IHE's March 14 written order on the UFW's motion in limine. The UFW filed an opposition to the appeal on March 28 and Wonderful requested to file a reply on April 7, which the UFW moved to strike.

Discussion

The Timeliness of the First Appeal

Interlocutory appeals from orders of an IHE made during an investigative hearing in a representation case are governed by the procedure set forth in Board regulation 20242. (Board reg. 20370, subd. (s); *Wonderful Nurseries, LLC* (Apr. 12, 2024) ALRB Admin. Order No. 2024-08, p. 2.) Under that procedure, a party intending to appeal a ruling or order of an IHE must file the appeal "within five days of the ruling." (Board reg. 20242, subd (b).) Under Board regulation 20170, subdivision (b), Saturdays and Sundays are excluded from the computation where the time period is less than seven days. Under Board regulation 20169, subdivision (a)(2), electronically filed documents "received after 5:00 p.m. on a business day

… will be deemed filed on the next regular business day."

In this case, there is no dispute as to the basic facts concerning the timeliness of the first appeal. First, the oral ruling on the "template declaration" occurred on March 11 while the rulings on the privilege objections occurred on March 12. Second, the appeal was transmitted to the Board at 5:03 p.m. on the afternoon of March 18 while the evidence in support of the appeal was not filed until the morning of March 19. Because the appeal and supporting evidence was received by the Board after the filing deadline, the appeal is untimely as to the March 11 ruling but timely as to the March 12 rulings.

Wonderful argues the UFW created a chaotic situation by calling witnesses whose testimony "drew" privilege objections prior to the IHE issuing orders on the pending petition to revoke and motion in limine. However, the portions of the record supplied by Wonderful do not substantiate this contention. To the contrary, after the IHE ruled on the template declaration, counsel for Wonderful stated, "we have, as you know, a certain number of days in order to take a review to the Board … we plan on using the time that's allowed us under the regulations." (Tr. Vol. 47, p 19.) Wonderful also argues the IHE's oral rulings were "engulf[ed]" in his later written order. The written order, however, deals with application of the crime/fraud exception. There is no indication that any of the oral rulings identified by Wonderful were based on the crime/fraud exception. In particular, the IHE's ruling on the template declaration was based upon the exception to the work product doctrine that applies in situations where application of the rule would cause unfair prejudice or injustice. (CCP, § 2018.030, subd (b).) Finally, Wonderful states vaguely that it was "hampered by technical difficulties." It does not elaborate on what these difficulties were or if they were the cause of

the appeal being filed after the deadline, nor does it provide declaratory or other evidence on this issue. Furthermore, while the appeal itself was filed only a few minutes after the deadline, the supporting evidence, which is a necessary part of the appeal, was not filed with the appeal but was filed the following morning.

Accordingly, we find the appeal was not timely filed as to the IHE's March 11 ruling on the template declaration and may not be considered.

The Evidence Provided by the Parties in Support of their Filings

In *Monterey Mushrooms, LLC* (Jun. 18, 2024) ALRB Admin. Order No. 2024-21-P, the Board emphasized the requirement that a party filing a special appeal under Board regulation 20242 must include "all documents necessary for the Board to rule on such applications." (*Id*. at p. 3.) The Board designated the order precedential to emphasize the importance of the issue and stated it would consider denying appeals that fail to comply. In this case, Wonderful provided transcript excerpts in support of its appeals along with a copy of the March 14 order and one declaration. However, Wonderful's presentation of evidence poses numerous issues of concern for the Board. First, while Wonderful submitted Exhibits A-O in support of its second appeal, when it referred to them in its brief, it failed to cite the exhibit letters, making its citations difficult to follow. More problematic, Wonderful's motion is replete with statements concerning purported facts that are not supported by the limited evidence offered by Wonderful in support of its appeals. These include references to purported oral rulings that do not appear in the transcript excerpts and references to written orders that are not supplied. The UFW too failed to support its motion to strike with declarations or other evidence, despite making a factual representation concerning an alleged email relevant to the

timeliness of Wonderful's appeal. These are only examples of an overall pattern of the parties presenting motions and other papers to the Board with supporting evidence that is incomplete at best and completely missing at worst.

Representations and arguments made by counsel in a motion or brief are not evidence. (*Rincon Pacific, LLC* (2020) 46 ALRB No. 4, p. 8, fn. 7 (citing *Gdowski v. Gdowski* (2009) 175 Cal.App.4th 128, 139).) The Board is not required to search the record to attempt to substantiate the parties' factual representations. Additionally, parties are entitled to know the evidence on which their adversary relies, rather than try to intuit the basis of allusions to the record or other evidence not provided. What this means for the instant appeals is that the Board will consider only those rulings on which Wonderful has provided evidence. Wonderful makes vague allusions to other rulings that occurred in this case on which it provides no evidence. Any such rulings have not been presented to the Board and are not under consideration.[2]

Appropriateness of Interlocutory Review

Under Board regulation 20242, subdivision (b), interlocutory appeals are not allowed except upon special permission from the Board. As a general rule, the Board will entertain interlocutory appeals only when the issues raised cannot be addressed effectively through exceptions. (Board Reg. 20242, subd. (b); *King City Nursery, LLC* (Jan. 9, 2020) ALRB Admin. Order No. 2020-01-P, pp. 3-4.) The Board has recognized an order requiring

[2] Wonderful represents that the IHE made oral rulings predicated on his crime/fraud analysis and that he stated that his pending written order would provide the full rationale. To the extent that representation is accurate, those rulings may be impacted by the Board's ruling on the IHE's March 14 written order. However, as those purported rulings were not provided to the Board, the Board is not in a position to assess them.

the disclosure of information a party claims is protected by a privilege or privacy protection is generally not one that can be effectively remedied through exceptions. (*King City Nurseries, LLC, supra, ALRB Admin Order No*. 2020-01-P, p. 4.) Here, the March 12 oral privilege rulings would require the disclosure of information Wonderful claims is protected by attorney-client privilege. The March 14 written order sets forth the IHE's conclusion that communications that would otherwise be privileged will be deemed non-privileged under the crime/fraud exception. While the IHE denied the UFW's motion in limine, he stated he would be ruling on privilege objections based upon the conclusions set forth in his order. The Board finds the issue sufficiently ripe to make interlocutory review appropriate.[3]

Privilege Objections Involving Communications Between Paralegals and Attorneys

On March 12, the UFW called, as adverse witnesses, two paralegals employed by the Roll Law Group, which provides legal representation to Wonderful. These paralegals were tasked with meeting with employees and taking declarations from them. Each paralegal was asked to disclose communications she had with Wonderful's attorney(s) prior to taking the declarations.

Paralegal Del Aguila was asked if she mentioned a card to "Sean or Estefani" (evidently attorneys Sean Sullivan and Estefani Rodriguez). Wonderful objected on privilege grounds while the UFW argued "there's no attorney-client relationship here." The IHE

[3] Wonderful contends that the IHE has already overruled privilege objections based upon his crime/fraud analysis. As noted previously, however, Wonderful has not supplied the portions of the transcript reflecting such rulings.

overruled the objection. Wonderful instructed the witness not to answer.

Paralegal Aragon testified that, during a plane flight to Wasco, she had discussions with "Sean or Jacqulene" about what she would be doing in Wasco. She was asked to disclose the content of those discussions and Wonderful objected on privilege grounds. Wonderful contended Aragon was acting as an agent of Wonderful and was assisting attorney Sean Sullivan to obtain declarations. The UFW contended there was no attorney-client relationship between the paralegal and the attorney. The IHE overruled the objection.

A party claiming privilege has the burden of establishing the preliminary facts necessary to support a *prima facie* claim of privilege, i.e., "a communication made in the course of an attorney-client relationship." (*Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 732.) If that showing is made, the communication is presumed to have been made in confidence and the opponent of the claim of privilege has the burden of proof to establish the communication was not confidential or that the privilege does not for other reasons apply." (*Ibid*.)

With respect to the questions asked of paralegals Del Aguila and Aragon, the basis of the IHE's ruling appears to be there was no attorney-client relationship between the attorneys and the paralegals. The Board concludes, however, that the attorney-client privilege generally protects communications between an attorney and staff such as paralegals who are assisting the attorney with the representation. The attorney-client privilege is "not so narrow" as to apply only to communications directly between the attorney and the client. (*Fireman's Fund Insurance Co. v. Superior Court* (2011) 196 Cal.App.4th 1263, 1273.) The privilege, for example, protects communications between attorneys within a law firm even when the client is

not present for the communication. (*Ibid*.) It also protects communications with "a nonattorney agent retained by the attorney to assist with the representation." (*Ibid* [attorney's communications with retained non-attorney investigator were privileged to the extent they implicated the attorney's legal opinions].)

The Board concludes Wonderful has demonstrated a *prima facie* showing that the communications were made in the course of an attorney-client relationship and are, therefore, presumptively privileged. The UFW has not presented evidence that would rebut this presumption. Accordingly, the Board reverses the IHE's March 12 rulings on the questions asked of Del Aguila and Aragon.

Privilege Objections Involving Saldivar and Calvo

The other March 12 oral ruling identified by Wonderful involves communications between Wonderful human resources employee Ana Saldivar and labor consultant Raul Calvo during a meeting or meetings where Wonderful attorneys were present. Saldivar testified about this meeting where Calvo and Wonderful attorneys were present. Calvo is not himself an attorney and was retained by Wonderful as a labor consultant. Saldivar testified she did not know why Calvo was present at the meeting in question. When Saldivar was questioned concerning Calvo's statements during this meeting, Wonderful objected on attorney-client privilege grounds. The IHE overruled the objection. Later, Saldivar was asked about a second meeting with Calvo and whether anyone at the meeting explained whether the contemplated meetings with employees were legal. Wonderful again objected on privilege grounds. The IHE sustained the objection as to communications with attorneys but overruled the objection with respect to any statements by non-attorneys, including Calvo. Wonderful

instructed the witness not to answer.

Wonderful's appeal of these rulings raises the issue of the privileged status of communications during meetings involving an attorney and a representative of the organizational client where a third party who is neither an attorney, nor an employee of the client, is present. California law requires the Board to uphold the purpose of the attorney-client privilege "to safeguard the confidential relationship between clients and their attorneys." (*Costco Wholesale Corp. v. Superior Court, supra,* 47 Cal.4th 725, 732.) At the same time, the Board must also apply the limits and exceptions to the privilege and ensure that claims of privilege are properly substantiated. (*Triple A Machine Shop, Inc. v. State of California* (1989) 213 Cal.App.3d 131, 143 ["It is axiomatic that the privilege covers only those communications protected by statute"].) It is clear disclosure of otherwise privileged information to a third party may waive the privilege. (Evid. Code, § 952; *D.I. Chadbourne, Inc. v. Superior Court* (1964) 60 Cal.2d 723, 735 ["where the client communicates with his attorney in the presence of other persons who have no interest in the matter … he is held to have waived the privilege"].) However, it is equally clear privileged information may be disclosed to a third party without waiving the privilege where "disclosure is reasonably necessary for the accomplishment of the purpose for which the lawyer … was consulted." (Evid. Code, § 912; *Insurance Company of North America v. Superior Court* (1980) 108 Cal.App.3d 758, 763; *Cooke v. Superior Court* (1978) 83 Cal.App.3d 582, 588.)

Thus, the presence of a third party in an otherwise privileged meeting does not automatically waive privilege, nor does the fact that the client or attorney desired the presence of the third party automatically preserve the privilege. The question is whether the presence of

the third party meets the "reasonably necessary" standard. In *Behunin v. Superior Court* (2017) 9 Cal.App.5th 833, the appellate court addressed the burden of the proponent of privilege when a third party retained consultant was present during the putatively privileged communication. In such circumstances, the proponent must "prov[e] that [the] third party was present to further the interest of the proponent." (*Id*. at 845.) This burden reflects that "the privilege turns on the nature of the relationship and content of communications with the third party in question" and, therefore, "the proponent is in the better posture to come forward with specific evidence explaining why confidentiality was not broken." (*Id*. at 485.) The required showing is factual in nature; conclusory statements are insufficient. (*Id*. at 849-850 [client's claim that communications with public relations consultant were intended to be confidential and the consultant was retained "to develop and deploy and tactics of [the client's] legal complaint" did not constitute "evidentiary facts showing or explaining why [the attorney] needed [the consultant's] assistance to accomplish the purpose for which [the client] retained him"].)

The Board will assume for present purposes the conversations at issue would be presumptively privileged but for Calvo's presence. Wonderful has not supplied sufficient evidence to conclude Calvo's presence was reasonably necessary for the accomplishment of the purpose for which the advice of Wonderful's attorney was sought. In fact, Wonderful provided virtually no evidence on this issue. The transcript excerpts provided by Wonderful establish no more than that Calvo was present for the conversations in question. They supply no evidence concerning whether his presence was reasonably necessary. Indeed, Saldivar testified that she did not know why Calvo was there. Even if we were to consider the declaration of Craig Cooper, which was submitted in support of Wonderful's second appeal,

that declaration merely states that Calvo was retained by Wonderful to "provide assistance to Wonderful."[4] This statement is even less specific than the evidence found to be insufficient in *Behunin v. Superior Court, supra*.

It was Wonderful's burden to establish the conversations Calvo participated in remained privileged because Calvo's presence was reasonably necessary. Additionally, it was Wonderful's burden under the Board's regulations to support its appeal with evidence. Wonderful failed to meet those burdens and, therefore, the Board denies Wonderful's appeal of the two IHE rulings concerning Saldivar's testimony.

The IHE's March 14 Order Applying the Crime/Fraud Exception

The IHE's March 14 order focused on the application of the crime/fraud exception to this case. The principal issue is whether the application of the crime/fraud exception may be predicated on *prima facie* evidence that the services of the attorney were sought or obtained to enable the commission of an unfair labor practice. The IHE answered this question in the affirmative.

The IHE began by surveying the state of National Labor Relations Act (NLRA) precedent on the issue. The principal case on the issue is *Patrick Cudahy, Inc*. (*Cudahy*) (1988) 288 NLRB 968. In that case, the National Labor Relations Board (NLRB) concluded application of the crime/fraud exception could not be predicated on the commission of an unfair labor practice. The NLRB cited the lack of precedent defining an unfair labor practice as a crime or tort, the absence of penal provisions, penalties, or fines in the NLRA and the

[4] The declaration purports to attach an "engagement letter" but no such document was attached to the filing received by the Board.

essentially remedial purposes of the NLRA. (*Id*. at 972.) The NLRB also found "great danger in losing sight of the foundations of this narrow exception" and "broad application of the exception to the NLRA would result, essentially, in swallowing up the privilege altogether." (*Id*. at 973.)

While acknowledging the NLRB had rejected an unfair labor practice-based crime/fraud exception, the IHE found that *Cudahy* was not applicable precedent that the ALRB is required to follow.[5] This was because the result in *Cudahy* was "largely tied to the lack of any penal provisions in the NLRA." However, effective in 2023, the ALRA now features civil penalties as a remedy for unfair labor practices. (See Lab. Code, § 1160.10.) This, the IHE concluded, distinguished the ALRA from the NLRA.

Although the IHE applied the "crime" prong of the crime/fraud exception, he does not appear to have concluded the presence of civil penalties meant that violation of the ALRA is now a "crime" but only that the ALRB is not obligated to follow *Cudahy* on this issue. Thus, the question became, given the inapplicability of *Cudahy*, may the application of the crime/fraud exception be based on violation of the ALRA. On this question, the IHE turned to federal cases that had expanded the federal version of the crime/fraud exception beyond its traditional bounds based upon policy considerations.

The principal case cited by the IHE was *Diamond v. Stratton* (*Diamond*) (S.D.N.Y. 1982) 95 F.R.D. 503. In *Diamond*, the federal court extended the crime/fraud exception to the tort of intentional infliction of emotional distress upon finding that the policy

[5] Under Labor Code section 1148, the Board is required to follow the "applicable precedents of the National Labor Relations Act."

rationale for applying the exception to crimes and frauds applied. The IHE also cited another federal case that, in dicta, stated it would be inclined to extend application of the crime/fraud exception to conduct involving sexual harassment/discrimination under a similar rationale. (*Coleman v. American Broadcasting Companies, Inc*. (D.D.C. 1985) 106 F.R.D. 201.)

The IHE found the reasoning of the cited federal cases persuasive. Finding violations of the ALRA are "no less deserving of the protections offered by the crime/fraud exception" than the intentional torts in cases such as *Diamond* and *Coleman*, the IHE concluded application of California's crime/fraud exception may be based upon *prima facie* evidence of the commission of an unfair labor practice in violation of the ALRA.

The IHE proceeded to find there was *prima facie* evidence Wonderful violated the ALRA by soliciting employees to revoke their authorization cards and by providing "direct aid" in the revocation of cards. The IHE found Wonderful's effort in this regard could not have been accomplished without its attorneys who were present at or near the interviews, drafted the template declaration used to create the declarations, and reviewed and approved the declarations. The IHE found the declaration-taking could not have been accomplished unless Wonderful had requested such services from its attorneys, which was a request to engage in future conduct to violate the ALRA. Thus, the IHE concluded that "the UFW meets the requirements for establishing a *prima facie* case for invocation of the crime/fraud exception to attorney-client privilege." The IHE applied this analysis to find the separate and somewhat distinct crime/fraud exception to the attorney work product rule applied as well.

While the Board agrees NLRA precedent on the crime/fraud exception is not controlling here, and acknowledges the gravity of violations of the ALRA, it finds the

exception cannot be extended to include unfair labor practices under the rationale adopted by the IHE.[6]

The IHE correctly observed textual differences between the ALRA and the NLRA concerning the remedies available for unfair labor practices, finding these differences rendered NLRA precedent on the crime/fraud exception inapplicable. However, the Board finds, irrespective of these textual differences, the difference in remedies available under the NLRA versus the ALRA does not control the issue of whether communications between Wonderful and its attorneys are privileged. This is because the California statutory law of privilege, and not the ALRA, is the source of attorney-client privilege in California. (*Valley Bank of Nevada v. Superior Court* (1975) 15 Cal.3d 652, 656 ["it is clear that the privileges contained in the Evidence Code are exclusive"]; see also *Tex-Cal Land Management v. ALRB* (1979) 24 Cal.3d 335, 351 [obligation to follow applicable precedents of NLRA extends to substantive but not procedural rules].) Thus, the Board must turn to the California law of privilege when determining the proper application of the crime/fraud exception.

The Board does not understand the IHE to have concluded commission of an unfair labor practice is a "crime" per se. To that extent, the Board agrees unfair labor practices are not criminal in nature and, even with the addition of civil penalties, are not criminal in effect. While there appears to be no California authority on the question of whether violation of a labor relations or similar statute may be treated as a "crime" for purposes of the crime/fraud

[6] While this discussion will focus on the crime/fraud exception to the attorney-client privilege, it is equally applicable to the exception to the attorney work product rule. While there are distinctions between the privilege and the work product crime/fraud exceptions, those distinctions are not relevant here.

exception, there are California cases that have analyzed whether facially civil statutes are sufficiently punitive in purpose or effect as to trigger constitutional protections applicable to criminal statutes, such as the right to jury trial and the prohibition against ex post facto penal legislation. (See, e.g., *Hipsher v. Los Angeles County Employees Retirement Association* (2020) 58 Cal.App.5th 671; *21st Century Insurance Co. v. Superior Court* (2005) 127 Cal.App.4th 1351.) These cases have held that the predominant consideration is whether the legislature "in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other." (*21st Century Insurance Co. v. Superior Court, supra,* 127 Cal.App.4th 1351, 1360.) Where the legislature intended that a statute be civil in nature, that intent normally controls and "only the 'clearest proof' will suffice to override the Legislature's stated intent and render a nominally civil statute penal." (*Id*. at 1363.)

In the case of the ALRA, when the Legislature added monetary penalties to the statute, it explicitly designated them as "civil" in nature. (See, e.g., Lab. Code, § 1160.10, subd (a)(1) ["Any employer who commits an unfair labor practice shall … be subject to a civil penalty"].) This expressed intent precludes treating the ALRA's civil penalty provisions as criminal in nature absent the "clearest proof" that the penalizing provisions are "so punitive in purpose or effect as to outweigh the Legislature's intent." (*21st Century Insurance Co. v. Superior Court* (2005) 127 Cal.App.4th 1351, 1362.) The cases that have examined the alleged criminal effect of civil penalties and other similar penalizing provisions have generally found them not to give nominally civil statutes criminal effect. (See *People v. Witzerman* (1972) 29 Cal.App.3d 169, 177 ["The statutory action before us was not rendered criminal in nature because the People therein sought civil penalties"].)

The Board concludes unfair labor practices under the ALRA, even after the addition of civil penalties to the statute, are not criminal in intent or effect such that commission of an unfair labor practice would constitute a "crime" for purposes of the crime/fraud exception.

The question then becomes whether the crime/fraud exception may be applied under the rationale of cases such as *Diamond*, i.e., because the policy reasons for applying an exception to privilege in cases of crime and fraud apply equally to other wrongful conduct, including conduct in violation of the ALRA. The Board concludes the extension of the crime/fraud exception under this rationale is precluded under California's statute-based privilege law.

The fundamental problem with applying the rationale of the federal courts that have expanded the traditional scope of the crime/fraud exception is that federal law utilizes a common law or case law created crime/fraud exception. (See *United States v. Zolin* (1989), 491 U.S. 554, 562 ["Questions of privilege that arise in the course of the adjudication of federal rights are 'governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience'"] (quoting Fed. R. Evid. 501).) In contrast, California's attorney-client privilege, and the exceptions to the privilege, including the crime/fraud exception, are statutory in nature and cannot be modified through the kind of evolutionary process available under a common law system. The California Supreme Court has held "the Legislature has determined that evidentiary privileges shall be available only as defined by statute" and, accordingly, "deference to the Legislature is particularly necessary when we are called upon to interpret the attorney-client privilege." (*Roberts v. City*

of Palmdale (1993) 5 Cal.4th 363, 373.)

The statutory nature of California's privileges precludes California courts from recognizing non-statutory exceptions to privileges. The California Supreme Court has contrasted California's privilege statutes with the federal common law system where the creation of such exceptions is permitted. In *Dickerson v. Superior Court* (1982) 135 Cal.App.3d 93, the appellate court found it was prohibited from applying an exception to the attorney-client privilege recognized in federal case law but absent from California's statutory law. The court stated that, although the rule adopted by the federal case "may be a desirable means of preventing abuse of the attorney-client privilege by corporate fiduciaries, this court cannot properly alter the legislative scheme by adopting such a nonstatutory exception." (*Id*. at 100; *Wells Fargo Bank v. Superior Court* (2000) 22 Cal.4th 201, 208-209 ["What courts in other jurisdictions give as common law privileges they may take away as exceptions. We, in contrast, do not enjoy the freedom to restrict California's statutory attorney-client privilege based on notions of policy or ad hoc justification"].)

Accordingly, given that the commission of an unfair labor practice is not a "crime," and the scope of the crime/fraud exception cannot be expanded based upon the policy rationales used by federal courts to expand the federal crime/fraud exception, the IHE's application of the crime/fraud exception based upon his conclusion that Wonderful *prima facie* committed an unfair labor practice must be reversed.

The Board emphasizes it is only reviewing the issues presented to it and that are ripe for interlocutory appeal. In light of the Board's conclusion concerning application of the crime/fraud exception based upon unfair labor practices, other issues decided by the IHE,

including his conclusion concerning the establishment of a *prima facie* case that Wonderful engaged in an unfair labor practice are moot. Additionally, it is not necessary to decide, and the Board does not rule on, other potential applications of the crime/fraud exception to administrative cases under the Act. While this specific unfair labor practice-based application of the exception is not supported by California law, the ordinary rules of the crime/fraud exception continue to apply in ALRB cases and the exception may be invoked under either the crime or fraud prong. The IHE has, for example, indicated he could apply the exception if *prima facie* evidence shows Wonderful submitted employee declarations it knew to be false. The IHE suggested application of the exception under those circumstances would be justified under the "fraud" prong and the Board notes the NLRB has applied the exception on an analogous theory under the "crime" prong. (*Smithfield Packing*, (2004) 344 NLRB 1, 13-14.) Given that the IHE concluded there was not sufficient evidence in the record at the time of his order to justify this application of the fraud prong of the exception, we need not consider it at this time. Likewise, we need not consider at this time whether or under what circumstances the fraud prong of the crime/fraud exception may be applicable under California law.

ORDER

PLEASE TAKE NOTICE that Wonderful's applications for special permission to appeal are GRANTED IN PART AND DENIED IN PART. Wonderful must comply with the IHE's order concerning the template declaration(s) by producing those documents. Additionally, Wonderful must comply with the IHE's rulings concerning Saldivar's testimony. The IHE's order on the application of the crime/fraud

exception and on the testimony of Del Aguila and Aragon are reversed. The UFW's motions to strike are DENIED.

IT IS SO ORDERED.

DATED: May 16, 2025

VICTORIA HASSID, Chair

ISADORE HALL, III, Member

BARRY D. BROAD, Member

RALPH LIGHTSTONE, Member

CINTHIA N. FLORES, Member