

1 RICHARD DOYLE, City Attorney (#88625)
2 NORA FRIMANN, Chief Trial Attorney (#93249)
3 SANDRA LEE, Deputy City Attorney (#203703)
4 Office of the City Attorney
5 151 West Mission Street
6 San Jose, California 95110
7 Telephone: (408) 277-4454

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8 Attorneys for CITY OF SAN JOSE

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SUPERIOR COURT OF CALIFORNIA, COUNTY OF SANTA CLARA

CITY OF SAN JOSE,

CV815401

Plaintiff,

vs.

JOHN WEBSTER,

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF CITY
OF SAN JOSE'S MOTION FOR
PROTECTIVE ORDER**

Defendant.

Date: June 13, 2003
Time: 9:00 a.m.
Dept: 18
Judge: Hon. Thang Barrett

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I. INTRODUCTION

The City of San Jose ("City") obtained a temporary restraining order pursuant to the workplace violence statute, Code of Civil Procedure §527.8, to prohibit the defendant John Webster ("Webster") from coming within 300 yards of City employee, Police Lt. Brenda Herbert ("Herbert"). With the permanent injunction hearing pending, the defendant noticed the deposition of Brenda Herbert.

The City of San Jose hereby moves for a protective order to prevent the taking of the deposition of its employee, Lt. Herbert, the individual that the City is seeking to protect from further threats, harassment and stalking by the defendant in the underlying injunction application. Alternatively, the City moves for a protective order imposing certain conditions on the conduct of the deposition and limitations on the scope of the deposition to prevent unwarranted annoyance, embarrassment and oppression to the deponent.

The City of San Jose respectfully submits the following points and authorities in support of its Motion for Protective Order.

II. FACTUAL BACKGROUND

The City of San Jose's application for a temporary restraining order and permanent injunction was submitted in response to an escalation in the persistent harassment to which the defendant has subjected City employee Brenda Herbert for several years since the defendant's conviction for child pandering. The application and attached declarations and exhibits are referenced as though fully set forth herein.

In 1990, in the course of her duties as a police officer, Brenda Herbert was involved in a sting operation related to the investigation of possible child exploitation. Her involvement was limited to speaking on the telephone with defendant John Webster. During the calls, which were recorded, Webster made statements about a plan involving sexual relations with his children. Webster was subsequently prosecuted and entered a plea of no contest to a felony charge of child pandering.

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1 In September 1994, the City of San Jose, through its employee Police Lt. Glenn
2 McCourtie, got its first inkling of the obsession of Webster that would resurface time and
3 again for many years. At a shopping mall, Webster approached Herbert's colleague, Lt.
4 McCourtie, who was in police uniform and spoke to McCourtie at length about Lt. Herbert
5 and Mr. Webster's 1990 criminal case. Lt. McCourtie was concerned about Mr. Webster's
6 intensity and fixation with Herbert even after so much time had elapsed, and described
7 Webster as "strange" and "paranoid". (Declaration of Lt. Glenn McCourtie attached to Ex
8 Parte Application for Orders, hereinafter "Mccourtie Decl.", ¶3-4.)

9 The following year, Webster began to take more overt action directed at Herbert. In
10 September 1995, Webster went to the Police Department and left a "reward" poster
11 accusing Lt. Herbert of altering evidence. Similar flyers were distributed to the public at a
12 local bar and dance club and through the mail. In January 1996, Webster again went to
13 Herbert's place of employment and left additional documents related to his accusations
14 against her. (Declaration of Lt. Ken Ferguson attached to Ex Parte Application for Orders,
15 hereinafter "Ferguson Decl.", ¶4-5.)

16 In addition to the personal visits to Herbert's workplace, Webster also took out
17 advertisements in the local newspapers accusing Herbert of altering evidence. He
18 maintains a website devoted in part to condemning Herbert, which includes (1) a copy of a
19 declaration that Herbert signed regarding Defendant's 1990 criminal conviction, (2) the
20 undercover tape recordings of the conversations between Defendant and Herbert leading
21 up to Defendant's arrest, (3) Defendant's views about sexual fantasies and the propriety of
22 arranging sexual experiences for his own children, and most recently (4) a request to
23 readers of the website for the addresses of Herbert and any of her family members.
24 (Ferguson Decl., ¶6.)

25 Herbert did not respond publicly to any of these persistent and unsubstantiated
26 attacks.

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1 After some time passed, Webster resumed more direct communications, sending
2 items directly to Herbert at her workplace. In July 1999, Webster mailed to Herbert a
3 postcard challenging her to a "duel to the truth". In the fall of 2000, Herbert received a flyer
4 from Defendant, who was then running for Assembly as a Libertarian candidate. The
5 campaign mailer referred to Herbert with a sketch purportedly of her, and accused her of
6 editing the tapes used in his criminal case more than a decade earlier. In June 2001,
7 Herbert received a copy of the Libertarian newsletter Frontiersman at her workplace with a
8 note that Herbert was mentioned in Defendant's article in that issue (Ferguson Decl., ¶7-
9 9.)

10 Herbert did not respond to Defendant's communications. Defendant then took a more
11 aggressive approach, attempting to compel a face-to-face encounter with Herbert.

12 In January 2002, Webster subpoenaed Herbert to testify at his trial before the United
13 States Tax Court. The Internal Revenue Service had brought an action against Webster for
14 failure to pay taxes. Webster claimed that he did not have to pay taxes, and in fact, the
15 government owed him money as a result of his allegedly wrongful prosecution in 1990. He
16 sought to compel Herbert to testify to admit her alleged wrongdoing back in 1990. The City
17 of San Jose filed a motion to quash the subpoena on behalf of Lt. Herbert which was
18 granted. (Declaration of Nora Frimann attached to Ex Parte Application for Orders,
19 hereinafter "Frimann Deci.", ¶5 and Exhibit A.)

20 Several months later, beginning around August 2002, Defendant repeatedly circled
21 Herbert's workplace in a large truck with an over-sized sign that stated, "San Jose BAD
22 COPS Starring Lt. Brenda Herbert ALTER EVIDENCE." On a number of those occasions,
23 for hours at a time, Defendant was observed sitting in his parked truck on the street by the
24 Police Department, Herbert's workplace. In September 2002, Webster parked the vehicle
25 across from Herbert's workplace and remained in the truck looking through binoculars at
26 employees as they left the office. (Declaration of Julie Mann attached to Ex Parte
27 Application for Orders, hereinafter "Marin Decl.", ¶4-6.) At some point, Webster managed to
28 take a photograph of another City of San Jose employee, whom he apparently believed to

1 be Herbert. Webster published this employee's photograph on his website and in mailings
2 sent to the pubuc at-large vilifying her as "the face of evil". (Declaration of Samuel Herbert
3 attached to Ex Parte Application for Orders, hereinafter "S. Herbert Decl.", Exhibit A.)
4 Webster continued circling Herbert's workplace in his truck and stationing himself outside
5 her workplace for several months.

6 Receiving no response, Webster took the next steps, corresponding directly with
7 Herbert for the first time, and then appearing at her home. On February 24, 2003,
8 Defendant hand-delivered to Herbert's workplace a disturbing and rambling letter in which
9 he blamed Herbert, who he had thought might have been his "soul mate", for causing his
10 estrangement from his children. in the letter, he insisted that she confess the past wrongs
11 against him, and suggested that afterward, they might write a book together. He also, for
12 the first time, confessed that he had "gone to all the trouble with all the flyers, handouts,
13 billboard truck, and the web-site" in the hope that Herbert would sue him for defamation.
14 Then, he could get her on the witness stand to vindicate himself and would then sue her,
15 the police department and the City. Webster also enclosed with the letter, a flyer with her
16 husband's name and their home address printed on it. In the flyer, Defendant stated, "Lt.
17 Herbert sells her soul." Defendant added veiled threats, referring to Herbert as "the face of
18 EVIL," and warning, "Bad cops turn good citizens into Terrorists." He also stated, "This is
19 what was happening to cause the Oklahoma bombing where hundreds of innocent people
20 were killed as 'collateral damage' In an effort to send a message...., (S. Herbert Deci.,
21 Exhibit A.)

22 That same month, Webster and a companion appeared at Herbert's home. Because
23 Herbert is a police officer, her address is confidential and would not be generally known to
24 the public. Webster knocked on the door loudly and continued knocking for some time
25 when no one came to the door; He returned on a subsequent occasion and, again,
26 persistently knocked when no one answered the door. (S. Herbert Decl., ¶2-5.)

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1 The City of San Jose subsequently sought and obtained a temporary restraining
2 order preventing Webster from contacting Herbert and from coming within 300 yards of
3 Herbert's workplace and home. The hearing on the injunction has been continued to July
4 25, 2003, with the temporary restraining order to remain in effect, so that this motion can be
5 heard in the interim.

6 III. LEGAL ARGUMENT

7 A. Code of Civil Procedure §2025(i) Authorizes the Issuance of a Protective Order 8 To Protect A Deponent From Unwarranted Annoyance, Embarrassment Or 9 Oppression On A Showing Of Good Cause

9 Code of Civil Procedure §2025(i) confers on trial courts broad power to enter a
10 protective order to prevent deposition discovery from causing "**unwarranted annoyance,**
11 **embarrassment, or oppression,** or undue burden and expense" to any party, deponent, or
12 other natural person. (Code Civ. Proc. §2025(i).) Upon a showing of good cause, the court
13 may make "**any order that justice requires**" for this purpose. (Code Civ. Proc. §2025(i).)
14 The moving party must show that these factors outweigh the likelihood that the information
15 sought will lead to the discovery of admissible evidence. *Emerson Electric Co. V. Superior*
16 *Court (1997) 16 Cal.4th 1101, 1110 (citing Code Civ. Proc. §2017(c)).*

17 The motion for a protective order may be made before, during, or after a deposition.
18 (Code Civ. Proc. §2025(i).) It must be accompanied by a declaration "stating facts showing
19 a reasonable and good faith attempt at informal resolution of each issue presented by the
20 motion." (Code Civ. Proc. §2025(i).)

21 The protective order may include any order that justice requires, including an order
22 that the deposition not be taken at all, that the deposition be taken on certain specified
23 terms and conditions, that certain matters not be inquired into, that the scope of certain
24 matters not be inquired into, and that all or certain of the documents designated in the
25 notice of deposition not be produced. (Code Civ. Proc. §§2025(i)(1), (5)-(6), (9)-(11).)

26 For the reasons set forth below, this Court should issue the requested protective
27 order.

28 ///

1 **B. Defendant Should Be Prohibited From Taking The Deposition Of Brenda**
2 **Herbert**

3 Counsel for Defendant Webster has indicated, during "meet and confer" discussions,
4 that he has two primary purposes for noticing the deposition of Lt. Herbert. The first
5 purpose is to determine whether she actually felt threatened by the actions of Mr. Webster.
6 The other expressed purpose was to revisit her participation in the sting operation in 1990,
7 which culminated in Mr. Webster's arrest and subsequent prosecution. Neither of these
8 purposes is an appropriate basis to depose Lt. Herbert in this matter.

9 **1. Code of Civil Procedure §527.8 Does Not Require a Subjective Finding of**
10 **Fear for an Employer to Restrain Conduct Directed at an Employee and**
11 **Therefore, Testimony of Lt. Herbert is Not Relevant**

12 Code of Civil Procedure §527.8 provides, in pertinent part, as follows:

13 (a) Any employer, whose employee has suffered...a credible
14 threat of violence from any individual, that can reasonably be
15 construed...to have been carried out at the workplace, may
16 seek a temporary restraining order and an injunction on behalf
17 of the employee prohibiting further unlawful violence or threats
18 of violence by that individual.

19 (b) For purposes of this section:

20 (2) "Credible threat of violence" is a knowing and willful
21 statement or course of conduct that would place a
22 *reasonable person* in fear for his or her safety, or the
23 safety of his or her immediate family and that serves no
24 legitimate purpose.

25 (3) "Course of conduct" is a pattern of conduct
26 composed of a series of acts over a period of time,
27 however short, evidencing a continuity of purpose,
28 including following or stalkng an employee to or from
the place of work; entering the workplace; . . .or sending
correspondence to an employee by any means,
including, but not limited, the use of public or private
mails, interoffice mail, fax, or computer e-mail.
(emphasis added)

The statute is clear: threatening behavior subject to restraint is that which would
place a *reasonable person* in fear for his or her safety. This is an objective standard. The
subjective fear of a particular employee, in this case Lt. Brenda Herbert, is not at issue in
this matter.

1 The application for a restraining order in the case was made without a declaration
2 from Lt. Herbert, and the Temporary Restraining Order was Issued without evidence of Lt.
3 Herbert's subjective feelings. This is because that information is not necessary for an
4 employer to obtain the relief contemplated by Code of Civil Procedure §527.8. What is at
5 issue is whether the City of San Jose believes that one of its employees suffered a credible
6 threat of violence from a particular individual, and on that basis, the City, as an employer,
7 can seek relief under the provisions of the subject code section.

8 Courts may prohibit a deposition when the testimony sought from a deponent is
9 irrelevant to the issues in the case. *Home Savings Bank V. Gilliam*, 952 F.2d 1152, 1157-58
10 (9th Cir. 1991) (preventing deposition when proposed testimony irrelevant to issue of
11 liability). In applying for a temporary restraining order and injunction, the City did not
12 submit a declaration by Herbert but instead relied on declarations of others with personal
13 knowledge of Webster's actions. Those actions, documented by Herbert's co-workers and
14 husband, would place a reasonable person in fear for her safety and the safety of those
15 near her at home and at work. (Code of Civ. Proc. §527.8(by(2).) Herbert's testimony is not
16 necessary to the City's application because the workplace violence statute no longer
17 includes a subjective component on the part of the victim. The legislature removed
18 subjective fear as an element when the statute was amended in 1998.¹ Consequently,
19 Herbert's deposition testimony is neither necessary nor appropriate in this case.

20 The provisions of CCP §527.8 are different from provisions found in CCP §527.6
21 (allowing individuals to obtain restraining orders) which require a showing of substantial
22 emotional distress to the plaintiff. Accordingly, the City of San Jose's efforts to enjoin
23 continued threats by Mr. Webster in this matter is not dependent upon the subjective
24 experience of Lt. Herbert. The City's remedies under Code of Civil Procedure §527.8 stem

25 ¹Previously "a credible threat of violence" was defined as a threat intended to cause, and actually causing, a person
26 to believe that he or she was under a threat of death or serious bodily injury. *City of Palo Afto V. Service*
27 *Employees International Union Local 715 (1999) 77 Cal.App.4th 327, 336, n.5.* Now, "a credible threat of violence" is
28 defined as a "knowing and willful statement or course of conduct that would place a reasonable person in fear for his
or her safety, or the safety of his or her immediate family, and serves no immediate legitimate purpose." *Id.* (quoting
code Civ. Proc. §527.8(b)(2)).

1 from the City's concern about potential workplace violence and the protection of its
2 employees. Defendant's effort to depose Lt. Herbert about her subjective feelings, or a
3 sense of being threatened, is nothing more than an effort to confront her, and should not be
4 allowed because such testimony is irrelevant to this action.

5 **2. Claims that Defendant was Unfairly Prosecuted in 1990 are Not**
6 **Relevant to the Relief Sought in this Action**

7 Mr. Webster also seeks to depose Lt. Herbert to question her under oath concerning
8 her participation in the sting operation that lead to his arrest over a decade ago. Based
9 upon allegations contained on his website, in materials provided to Lt. Herbert and other
10 Police Department employees, and on the statements made on the truck that he drives
11 around the Police Department, Mr. Webster apparently believes that Lt. Herbert
12 manipulated tape recordings of their conversations which occurred as part of the sting
13 operations. Notwithstanding his plea to the criminal charges, he continues to assert that he
14 was wrongfully prosecuted. He expressly admits in his recent correspondence to Lt.
15 Herbert that his harassing and threatening actions have been directed towards an
16 opportunity to question Lt. Herbert, under oath, with respect to that criminal prosecution.

17 This action, brought by the City of San Jose, should not be used by Mr. Webster to
18 question Lt. Herbert about events that occurred long ago in conjunction with her police
19 duties. Her involvement in that prosecution is irrelevant to the protection currently sought by
20 the City of San Jose because of Mr. Webster's inappropriate and threatening statements
21 and conduct. If Mr. Webster believed that Lt. Herbert had manipulated or manufactured
22 evidence in the case against him, he had an opportunity to prove that in a criminal trial, but
23 chose not to do so. Code of Civil Procedure §2017(a) states simply: "Unless otherwise
24 limited by order of the court... any party may obtain discovery regarding any matter, not
25 privileged, that is **relevant** to the subject matter involved in the pending action..."
26 (Emphasis added.) Mr. Webster should not be allowed to misuse the civil process in this
27 action brought by the City of San Jose to question Lt. Herbert about irrelevant matters and
28 his unsubstantiated accusations.

1 **3. The Court Should Issue a Protective Order Preventing the Deposition**
2 **In the Interest of Justice Because the Deposition is Calculated Only**
3 **to Harass, Annoy and Intimidate Herbert**

4 As evidenced by Webster's own words, the deposition is no more than another
5 vehicle of harassment. It has apparently been his desire for years to put Brenda Herbert
6 "on the stand" and get a face-to-face meeting with the woman he once thought might be his
7 "soul mate". Webster certainly had an opportunity to put Herbert on the stand in his criminal
8 case but instead chose to plead no contest and serve a jail term. He chose not to contest
9 the charges and to cross-examine Herbert at the appropriate time. Since then, Webster
10 has persistently sought to provoke Herbert so that she might sue him for defamation,
11 according to Webster, to allow him to re-litigate the issues that were rendered moot by his
12 plea. Webster sought to get Herbert on the stand in his case with the IRS for failure to pay
13 taxes. He sought to get a look at her by loitering around her workplace for hours and days
14 with binoculars and a camera. He tried to take a photograph of Herbert to publish in his
15 newsletter and website, inadvertently snapping the photo of a different City employee.
16 Having failed to provoke Herbert into initiating her own defamation action against him, it is
17 apparent that Webster believes the City's application for an injunction is, at last, his chance
18 to confront Herbert. Webster should not be permitted to **abuse the legal process** to
19 continue harassing Herbert. The purpose of the protective order provisions is precisely "to
20 give a court the power to issue protective orders to prevent discovery abuses." *Lowy*
21 *Development Corporation V. Superior Court (Fontenla) (1987) 190 Cal .App.3d 317, 321.*

22 Considering the history and pattern of relentless and escalating harassment and
23 threats, as well as the expressed purpose for the examination sought which is irrelevant to
24 this case, the interests of justice require that the Court grant the requested protective order
25 preventing the taking of Brenda Herbert's deposition.

26 **C. Justice Requires Protection From Unwarranted Annoyances or Oppression**

27 Should the Court permit the deposition to go forward, the Court should impose a
28 protective order with conditions on the conduct of the deposition to prevent unwarranted
annoyance, harassment or oppression to the deponent, Brenda Herbert. (Code Civ. Proc.

1 §2025(i.) The trial court has wide discretion to exercise reasonable control over deposition
2 proceedings to prevent abuse or misuse of depositions on a showing of good cause.
3 *Carison v. Superior Court* (1961) 56 Cal.2d 431, 437-440 (recognizing that factual showing
4 of harassment as sole motive for deposition would be statutory basis for preventing
5 deposition). Under the extraordinary circumstances of this case, justice requires that
6 Defendant be prohibited from having any face-to-face contact with Brenda Herbert during
7 the deposition.²

7 **1. Lt. Herbert Should be Allowed to Attend by Telephone**

8 CCP §2025(h) provides for depositions by telephone. This section states, in part:
9 "The court may expressly provide that a nonparty deponent may appear at his or her
10 deposition by telephone if it finds that there is good cause and no prejudice to any party."
11 Party deponents shall appear in person.

12 In this case, Lt. Herbert is not a party to the underlying action. While the relief sought
13 affects and benefits her, the party Plaintiff is the City. Therefore, the court may provide that
14 she can attend the deposition by phone, should the court find some legitimate basis for her
15 deposition to be taken.

16 **2. Under Appropriate Circumstances The Court May Place Restrictions On
17 The Extent Of Contact Between A Party And A Deponent**

18 Code of Civil Procedure §2025(i) indicates that "parties to the action and their officers
19 and counsel" may not be "excluded" from a deposition.³ (Code Civ. Proc. §2025(i)(12)
20 (emphasis added).) Though it would be highly unusual to prevent a party from being in the
21

22 ²Because Defendant posted a photograph of a woman who is not Lt. Herbert on his website, the City believes
23 that the Defendant does not recognize Lt. Herbert by sight. That should continue to be the case.

24 ³Code of civil Procedure §2025(i) provides, in pertinent part, as follows:

25 The court, for good cause shown, may make any order that justice requires to protect any party,
26 deponent, or other natural person or organization from unwarranted annoyance, embarrassment, or
27 oppression, or undue burden and expense. This protective order may include, but is not limited to, one or
28 more of the following directions:

... (12) That designated persons, other than the parties to the action and their officers and counsel, be
excluded from attending the deposition.

1 same room as the deponent, the statute does not expressly preclude that arrangement, *cf.*
2 *Willoughby V. Superior Court (Lui)* (1985)172 Cal.App.3d 890, 892, if warranted by
3 extraordinary circumstances and required in the interest of justice. Requiring the party to be
4 in another room does not necessarily exclude him. He may follow the deposition by
5 telephone, or some other means, and arrange to take frequent breaks without limit in order
6 to more fully confer with counsel. The party is not necessarily excluded so long as he has a
7 meaningful opportunity to participate. A party has no unfettered right to see the deponent's
8 face.

9 It would involve an unnecessarily inflexible reading of the statute to require that every
10 party be allowed to be in the same room with a full view of the deponent in each and every
11 case, without exception. Even in proceedings where an individual's civil rights and liberties
12 are more clearly at stake, such as criminal trials, other arrangements may be made. See
13 *Matyland V. Craig* (1990) 497 U.S. 836 (holding that, consistent with confrontation clause,
14 child witness in criminal child abuse case may testify at trial outside defendant's presence
15 on specific showing of necessity); *People V. Williams* (2002)102 Cal.App.4th 995 (no
16 confrontation clause violation though adult sexual assault victim's trial testimony was
17 presented by videotape where during taping witness was under oath, was in presence of
18 judge and defense counsel, defense counsel was in contact with defendant during
19 testimony, and defense counsel had opportunity to cross-examine witness). The language
20 of Code of Civil Procedure §2025(i) does not require such a rigid interpretation. See, *e.g.*,
21 *Lowy Development Cotporation V. Superior Court (Fontenla)* (1987)190 Cal.App.3d 317,
22 321 (Though former Code Civ. Proc. §201 9(b)(1) provided for presence of "parties to the
23 action and their officers or counsel" at depositions, the court was not precluded from issuing
24 a protective order to exclude some of the officers, "if such an order [were] appropriate to the
25 case.") Rather, the Court retains the discretion to impose any protective order that justice
26 requires. (See Code Civ. Proc. §2025(i) (expressly setting forth a non-exhaustive list of
27 possible protective orders).

28 ///

1 In *Willoughby, supra*, 172 Cal.App.3d 890, the deponent who sought the protective
2 order was the plaintiff in an employment discrimination action. She sought to exclude her
3 supervisors, who were named defendants, from her deposition, claiming that she would feel
4 "intimidated" by their presence. The trial court granted the protective order, but the
5 appellate court reversed, appearing to equate preclusion from the room in which the
6 deposition was to take place to exclusion from the deposition. The facts of the present case
7 are clearly distinguishable from those in *Willoughby* and distinct from the more typical
8 actions contemplated by the *Willoughby* court. In *Willoughby*, not only was the deponent
9 the plaintiff who initiated the action and affirmatively sought compensation, but also, there
10 was no restraining order in place otherwise preventing the defendants from having contact
11 with the plaintiff. In this case, Lt. Herbert is not a party and is not seeking damages or
12 compensation. Rather, she has been the target of Defendant's campaign of harassment for
13 years, and she is now protected by a temporary restraining order in effect against
14 Defendant that prevents him from coming within 300 yards of her. The facts of this case
15 clarify that in some instances the interests of justice may override a party's interests in being
16 in the same room as the deponent and in having an unobstructed view of the deponent.

17 **D. The Scope Of The Deposition Should Be Limited To Exclude inquiry Into The**
18 **1990 Criminal Investigation And Prosecution**

19 The City of San Jose anticipates that Webster will use the deposition of Brenda
20 Herbert as a vehicle to inquire into a multitude of issues irrelevant to the present matter and
21 calculated only to further harass and intimidate Herbert. Though the City submitted
22 declarations from several percipient witnesses in support of its restraining order application,
23 Webster has only noticed the deposition of Herbert, from whom the City did
24 not obtain a declaration.⁴ Also, Webster admitted in his letter of February 23, 2003 to
25 Herbert and his pleadings seeking to compel Herbert's testimony in federal tax court in 2002

26 _____
27 ⁴As set forth above, the City's theory and the reasonable person standard contemplated by code of Civil
28 Procedure §527.8 did not require a declaration from the victim. The City elected to focus on the course of
conduct and its effect on a reasonable person rather than the victim's subjective reaction because it is not an
essential element of the workplace violence statute.

1 that all he wants is for Herbert to admit her wrongdoing in the 1990 criminal investigation
2 resulting in his arrest for child pandering. The onslaught of potentially defamatory
3 accusations and badgering over all of these years was calculated to achieve that result. This
4 deposition is only Webster's latest means to confront Herbert with questions that he could
5 have asked her at his criminal trial but elected to waive in pleading to the charge.

6 The Court may issue a protective order preventing inquiry into certain matters (Code
7 Civ. Proc. §2025(i)(9)), limiting the scope of the examination to certain matters (Code Civ.
8 Proc. §2025(i)(10)), and any other order that justice requires to prevent unwarranted
9 annoyance, embarrassment, or oppression to the deponent. (Code Civ. Proc. §2025(i).)
10 Webster should be prevented from inquiring into Herbert's involvement in the 1990 criminal
11 investigation, arrest, prosecution, and related criminal proceedings. Those events are
12 irrelevant to the restraining order sought and that line of questioning is not calculated to lead
13 to admissible evidence. This action concerns Webster's recent conduct that includes
14 threats of violence, stalking, ongoing harassment, and has invaded the privacy of Herbert,
15 her family and her co-workers. Any interests he might have in petitioning the government
16 about his grievances are not legitimately served by such conduct. Nor can the activities that
17 are the subject of the City's narrow application be constitutionally protected under the First
18 Amendment.

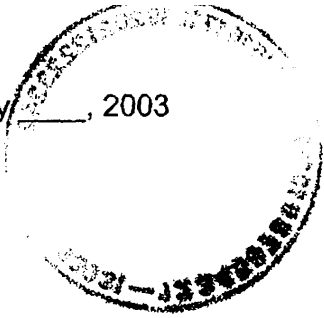
19 The likelihood of abuse of the discovery process weighs in favor of granting a
20 protective order to limit the scope of the deposition so as not to further subject Herbert, a
21 nonparty deponent and the person sought to be protected, to additional harassment,
22 annoyance and oppression. This protective order serves the interests of justice.

23 **IV. CONCLUSION**

24 The City of San Jose submits that good cause exists to grant this motion, and
25 respectfully requests that the Court grant a Protective Order precluding the deposition of
26 Brenda Herbert. Alternatively, the City requests that the Court grant a Protective Order (1)
27 requiring that the deposition be conducted without Defendant in the same room as Herbert
28 and without allowing him to observe her face-to-face at any point immediately before, during

1 or immediately after the deposition, and (2) limiting the scope of the deposition to exclude
2 inquiry into the matter of the 1990 criminal investigation and prosecution.

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4 Dated: May _____, 2003



RICHARD DOYLE, City Attorney

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6 BY: Sandra Lee
7 SANDRA LEE
8 Deputy City Attorney

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10 Attorneys for the CITY OF SAN JOSÉ
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