

TY CLEVENGER

Attorney at Law

1095 Meadow Hill Drive
Lavon, Texas 75166

telephone (979) 985-5289
facsimile (979) 530-9523

January 28, 2014

Clerk, U.S. Court of Appeals for the Fifth Circuit
600 S. Maestri Place
New Orleans, Louisiana 70130.

Re: Complaint of Misconduct against U.S. District Judge Frank Montalvo
(W.D. Tex.)

To Whom It May Concern:

On May 1, 2013, U.S. District Judge Frank Montalvo of El Paso issued a permanent protective order (attached as Exhibit A) compelling my client, Sandi Johnson, to remove a video from the Internet. As set forth in the enclosed November 12, 2013 letter to Judge Montalvo (Exhibit B), he issued the order without notice or an opportunity to respond, and purely on the basis of information that he received *ex parte*.

The video in question was the deposition of LaToshia Boxley, a.k.a. LaToshia Lewis, a witness in *Sandi Johnson, et al. v. Billy Blackburn, et al.*, Case No. 3:12-cv-00418-FM (W.D. Tex.). By his own admission, Judge Montalvo issued the order based on a letter that he received on April 24, 2013 from Ms. Boxley. It is not clear whether the letter included a sworn statement under oath, because I was not copied on the letter and Judge Montalvo has refused my request to see the letter.

As explained in my November 12, 2013 letter to Judge Montalvo, the video of Ms. Boxley's deposition was played in an open courtroom during the jury trial of *Johnson v. Blackburn*. Judge Montalvo would not have known this because he did not preside over the jury trial, but he would have known if my client had been afforded her due process rights of notice and an opportunity to respond. Likewise, he would have known (1) that the video had already been on the Internet for more than a year when he ordered its removal, and (2) at least some of Ms. Boxley's allegations against Ms. Johnson and me were false.

As my letter to Judge Montalvo suggests, he violated Canon 3(A)(4) of the Code of Conduct for United States Judges by receiving *ex parte* communications from Ms. Boxley. In response to my letter, Judge Montalvo issued a November 18, 2013 order (Exhibit C) justifying his actions on the grounds that he was acting on the basis of an emergency. This is utterly implausible. Nothing in the May 1, 2013 made any findings about an emergency, nor did it even suggest a emergency. Instead, it appears that Judge Montalvo's November 18 order was an attempt to retroactively justify his unlawful activities.

Fed. R. Civ. P. 65 expressly permits *ex parte* communications for purposes of granting *temporary* relief, thus Judge Montalvo's decision would be less objectionable if there was a genuine emergency and if he had granted a temporary restraining order until such time as Ms. Johnson's arguments could be heard. In this case, however, Judge Montalvo granted *permanent* relief without notice or an opportunity to be heard, and purely on the basis of sealed, *ex parte* evidence.

Although a judge freely may use *in camera*, *ex parte* examination of evidence to prevent the discovery or use of evidence, consideration of *in camera* submissions to determine the merits of litigation is allowable only when the submissions involve compelling national security concerns or the statute granting the cause of action specifically provides for *in camera* resolution of the dispute.

Vining v. Runyon, 99 F.3d 1056, 1057 (11th Cir. 1996). Nothing in the rules, statutes, or case law of the United States permits *ex parte* evidence for the purpose of suspending someone's First Amendment rights, much less without notice or an opportunity to respond.

I should note that I addressed my concerns to Judge Montalvo in a letter among the affected parties – rather than a public filing – because I did not want to embarrass or antagonize him. I am sure that Judge Montalvo's original order was the product of good intentions, and I do not doubt that Judge Montalvo believed whatever Ms. Boxley told him, but I am reminded of Proverbs 18:17: “The first to plead his case seems right, until another comes and examines him.” That principle is at the heart of Constitutional due process, and it has been part of Anglo-American jurisprudence since before the Magna Charta.

Moreover, insofar as Judge Montalvo refuses to reveal the purported evidence that he relied upon, he is furthering the appearance of impropriety. Parts of the letter that Judge Montalvo recounted are provably false, and the letter itself is likely unsworn, thus those facts could prove embarrassing to Judge Montalvo if the letter becomes public. He therefore has created the appearance that he is sealing documents in order to cover something up and save himself from embarrassment.

Finally, Judge Montalvo has been hostile toward me since I expressed my objections, and I must now wonder whether his actions are the product of bias. I must also wonder whether he is being influenced by some false allegation that LaToshia Boxley made against me, although I cannot know for certain until I see the letter.

I request that the Chief Judge or Judicial Council investigate this matter thoroughly and take appropriate disciplinary action. By copy of this letter, I request that Judge Montalvo recuse himself from Case No. 3:12-cv-00418-FM and Case No. 3:12-cv-00420-FM on his own initiative. Judicial Canon 3(C)(1) obligates a judge to “disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned, including but not limited to instances in which... the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts

concerning the proceeding...” Judge Montalvo has obtained personal knowledge of disputed evidentiary facts based on the *ex parte* communications with Ms. Boxley, and it appears that Judge Montalvo now has personal bias against my client and me as a result of those *ex parte* communications.

Thank you for your consideration of these matters.

Sincerely,

A handwritten signature in black ink, appearing to read 'Ty Clevenger', with a long horizontal stroke extending to the right.

Ty Clevenger

cc: The Hon. Frank Montalvo, Judge
U.S. District Court for the Western District of Texas
Ms. Sandi Johnson
Ms. LaToshia Boxley
Mr. Trae Thompson