



1 **PER CURIAM.**

2 {1} This matter comes before the Court on a petition for discipline filed by the Judicial  
3 Standards Commission (the Commission). As grounds for recommending discipline, the  
4 Commission states that a majority of the Commissioners determined that: (1) Judge  
5 Locatelli (Respondent) improperly issued criminal contempt complaints to two attorneys,  
6 Marcia Milner and Richard Jacquez, for their role in an appeal from his court; and (2) he  
7 improperly failed to recuse himself from the contempt proceedings. We deny the petition  
8 for discipline because the Commission has failed to prove willful misconduct by clear and  
9 convincing evidence. However, we write to clarify the preferred procedure for judges to  
10 follow if they believe attorneys are acting unethically in appealing from a judgment.

11 **BACKGROUND**

12 {2} This is the second time that the Commission has initiated proceedings against  
13 Respondent. In February 2006, this Court dismissed an earlier petition for discipline which  
14 alleged that Respondent had violated the Code of Judicial Conduct by criticizing the Las  
15 Cruces City Attorney's office for failing to prosecute DUI cases. This present petition also  
16 arises out of proceedings involving the City Attorney's office. On April 14, 2004,  
17 Respondent accepted an uncounseled guilty plea from an eighteen-year-old defendant for  
18 stealing a box of tampons. Respondent then sentenced the defendant to ninety days in jail,  
19 eighty-eight of which were suspended, and imposed a \$500 fine, \$300 of which was  
20 suspended. Subsequently, Marcia Milner, an attorney from Las Cruces, filed an appeal on  
21 behalf of the defendant for a trial de novo. When Respondent received notice of this  
22 appeal, he forwarded the record to the district court with a cover sheet informing the district  
23 judge that the defendant had entered a guilty plea. Respondent testified before the

1 Commission that when a defendant appealed from a guilty plea, the City Attorney's office  
2 would routinely file a motion to dismiss because the defendant was not an aggrieved party  
3 under NMSA 1978, § 35-13-1 (1975), and the appeals were routinely dismissed.  
4 Nevertheless, in this case, a trial de novo was set for August 10, 2004, and on that date,  
5 Richard Jacquez, the assistant city attorney assigned to the case, made an oral motion to  
6 dismiss on the basis that the defendant was not entitled to an appeal because she had  
7 entered a guilty plea and, thus, was not aggrieved. *See State v. Ball*, 104 N.M. 176, 183,  
8 718 P.2d 686, 692 (1986) (holding that a defendant who enters into an informed guilty plea  
9 is not an aggrieved party and cannot appeal to the district court for a trial de novo). The  
10 district court judge denied the motion to dismiss, based on Ms. Milner's argument that her  
11 client's plea was uninformed, allowed the defendant to enter another guilty plea, and  
12 sentenced her to a six-month deferred sentence with six months unsupervised probation.

13 {3} Respondent received a copy of the district court judgment in early September 2004.  
14 When he received the judgment and sentence, Respondent was concerned that the district  
15 judge had been misinformed about how the case had come before him. He then discovered  
16 that no written motion to dismiss had been filed by the assistant city attorney, who had not  
17 entered an appearance or filed a witness list until eight days before the hearing.  
18 Respondent suspected that the assistant city attorney had been unprepared and may not  
19 have asked the court to dismiss the case. He subsequently researched the "novel question  
20 of what [he] as an inferior court judge could do if [he] believed [his] decisions were being  
21 nullified by inaction of the City Attorney." Specifically, Respondent testified at the hearing  
22 before the Commission that he consulted with the Municipal League and the Attorney

1 General's office. He also looked into the difference between direct and indirect contempt.  
2 Shortly before the sentencing hearing, Respondent was told that the assistant city attorney  
3 did not challenge the district court judge's assumption that the defendant had not been  
4 informed of her rights or the defense attorney's representation that the defendant was not  
5 aware of the consequences of her decision to enter a guilty plea. He acknowledged that he  
6 became angry and decided to have both Mr. Jacquez and Ms. Milner "charged with  
7 indirect contempt for deliberately misrepresenting procedures employed in the municipal  
8 court."

9 {4} At the sentencing hearing on October 25, 2004, Respondent served both Ms. Milner  
10 and Mr. Jacquez with criminal complaints charging them with contempt. The basis of the  
11 contempt charge against Ms. Milner was that she filed a notice of appeal in district court  
12 knowing that the defendant had entered a guilty plea. The basis of the contempt charge  
13 against Mr. Jacquez was that he signed the district court judgment knowing that the appeal  
14 from municipal court was contrary to law. Respondent acknowledged, however, that he  
15 charged the attorneys with contempt without actually reviewing the transcript of the district  
16 court hearing. He also admitted that he believed he would need to recuse himself from  
17 contempt proceedings because his anger at the sentencing hearing had created an  
18 appearance of impropriety.

19 {5} After reviewing the transcript of the district court proceedings on November 4,  
20 2004, however, Respondent decided to dismiss the charges against the attorneys. He  
21 informed the City Attorney's office of his decision, but neglected to inform Ms. Milner.  
22 Before Respondent dismissed the charges on December 8, 2004, Ms. Milner appeared for

1 a scheduled pre-trial conference and a trial, only to discover nothing was happening.  
2 Respondent held no further hearings in the case from the date he charged the attorneys with  
3 criminal contempt to the date those charges were dismissed. The Commission concluded  
4 that by improperly issuing the criminal contempt complaints and by improperly failing to  
5 recuse himself in the contempt proceedings, Respondent had violated the Code of Judicial  
6 Conduct and had committed willful misconduct in office. In its petition to this Court, the  
7 Commission recommended that we issue a formal public reprimand, and order Respondent  
8 to take a judicial ethics course, complete a twelve month mentorship with a district judge  
9 and pay the costs of these proceedings. The Commission also recommended that we order  
10 that the records of the contempt cases be purged from the district court.

## 11 **DISCUSSION**

12 {6} Respondent challenges the Commission's conclusion that he engaged in willful  
13 misconduct. He first argues that he did not engage in misconduct at all because the  
14 contempt complaints had a sufficient legal and factual basis and that he had jurisdiction to  
15 charge the attorneys with indirect contempt. He then argues, alternatively, that even if he  
16 did commit legal error in charging the attorneys with contempt, such an action should not  
17 expose him to discipline because such an issue is a legal question for the appellate courts,  
18 and not the Commission, to decide. Finally, he argues that he did not commit willful  
19 misconduct when he remained assigned to the contempt cases.

20 {7} The New Mexico Code of Judicial Conduct has its origins in the principle that "[a]n  
21 independent and honorable judiciary is indispensable to justice in our society." Code of  
22 Judicial Conduct, Rules 21-100 to -901 NMRA pmb. And, as this Court wrote in

1 construing an earlier version of the Code, “[t]he conduct prescribed for judges and justices  
2 is more stringent than conduct generally imposed on other public officials.” *In re Romero*,  
3 100 N.M. 180, 183, 668 P.2d 296, 299 (1983). Thus, “any justice, judge or magistrate of  
4 any court may be disciplined or removed for willful misconduct in office.” N.M. Const.,  
5 art. VI, § 32. In order to discipline judges, “we must be satisfied by clear and convincing  
6 evidence that there is willful judicial misconduct.” *In re Castellano*, 119 N.M. 140, 149,  
7 889 P.2d 175, 184 (1995) (per curiam). Clear and convincing evidence is evidence that  
8 “instantly tilt[s] the scales in the affirmative when weighed against the evidence in  
9 opposition and the fact finder’s mind is left with an abiding conviction that the evidence  
10 is true.” *State ex rel. Children, Youth & Families Dep’t v. Joseph M.*, 2006-NMCA-029,  
11 ¶ 15, 139 N.M. 137, 130 P.3d 198 (quoted authority omitted).

12 {8} In *In re Martinez*, 99 N.M. 198, 203, 656 P.2d 861, 866 (1982), this Court discussed  
13 what constituted willful misconduct. We cited with approval the Supreme Court of North  
14 Carolina’s definition in *In re Edens*, 226 S.E.2d 5, 9 (N.C. 1976), that “[w]ilful misconduct  
15 in office is improper and wrong conduct of a judge acting in his official capacity done  
16 intentionally, knowingly, and, generally, in bad faith. It is more than a mere error of  
17 judgment or an act of negligence.” Thus, negligent violations of the Code of Judicial  
18 Conduct do not justify discipline or removal. As we stated in *In re Martinez*, violations of  
19 the Code “furnish some proof of what constitutes appropriate judicial conduct,” but they  
20 do not control the issue of whether discipline should be imposed. *In re Martinez*, 99 N.M.  
21 at 204, 656 P.2d at 867. We therefore address whether the facts as found by the  
22 Commission demonstrate willful violations of the Code of Judicial Conduct and willful

1 misconduct in office. First, we discuss whether charging the attorneys with criminal  
2 contempt constituted willful misconduct and, second, whether failing to recuse constituted  
3 willful misconduct.

#### 4 **The criminal contempt charges**

5 {9} The Commission concluded that Respondent had violated Rules 21-100, 21-200(A),  
6 21-300(B)(2) and (4) NMRA of the Code of Judicial Conduct when he charged attorneys  
7 Jacquez and Milner with criminal contempt and that such conduct constituted willful  
8 misconduct in office. Rule 21-100 requires that “[a] judge shall participate in establishing,  
9 maintaining and enforcing high standards of conduct, and shall personally observe those  
10 standards so that the integrity and independence of the judiciary will be preserved.” Rule  
11 21-200(A) requires that “[a] judge shall respect and comply with the law and shall act at  
12 all times in a manner that promotes public confidence in the integrity and impartiality of  
13 the judiciary.” Rule 21-300(B)(2) requires that “[a] judge shall be faithful to the law and  
14 maintain professional competence in it. A judge shall not be swayed by partisan interests,  
15 public clamor or fear of criticism.” Finally, Rule 21-300(B)(4) requires that “[a] judge  
16 shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others  
17 with whom the judge deals in the judge’s official capacity, and shall require similar conduct  
18 of lawyers, and of staff, court officials and others subject to the judge’s direction and  
19 control.”

20 {10} The Commission’s conclusion that Respondent had willfully violated these rules  
21 appears to have been based on the following findings: that Respondent improperly charged  
22 the attorneys with contempt; that Respondent issued the contempt charges before he

1 reviewed the transcript of the district court hearing; and that he displayed his anger at the  
2 hearing when he served the attorneys with the contempt complaints.

3 {11} The Commission inferred that Respondent's actions demonstrated bad faith because  
4 the contempt proceedings had no legal or factual basis. Although this inference is listed  
5 as a finding, it is based, in part, on a legal conclusion that there was no legal basis for  
6 Respondent's actions, which we review as a matter of law. *See In re Bristol*, 2006-NMSC-  
7 041, ¶¶ 16-18, 140 N.M. 317, 142 P.3d 905 (per curiam) (holding that in administrative  
8 disciplinary proceedings this Court defers to the fact finder on factual matters but reviews  
9 legal conclusions and recommendations for discipline de novo).

10 {12} The questions of whether Respondent acted correctly in charging the attorneys with  
11 indirect contempt or whether he violated the Code of Judicial Conduct are not the precise  
12 questions before us. We are specifically concerned with whether any misconduct was  
13 willful. *See In re Martinez*, 99 N.M. at 204, 656 P.2d at 867 (pointing out that violations  
14 of the Code of Judicial Conduct offer "proof of what constitutes appropriate judicial  
15 conduct" but do not control the issue of whether the violations were willful).

16 {13} As Respondent correctly argues, trial courts have the power to hold attorneys in  
17 indirect criminal contempt for "disobedient acts performed outside the court's presence."  
18 *State v. Wisniewski*, 103 N.M. 430, 434, 708 P.2d 1031, 1035 (1985). However, as we  
19 have previously stated, "contempt powers of the court should be used cautiously and  
20 sparingly." *Case v. State*, 103 N.M. 501, 503, 709 P.2d 670, 672 (1985). In support of his  
21 authority to charge the attorneys with contempt, Respondent argues that our Court of  
22 Appeals affirmed a contempt ruling in an abuse and neglect case when the contemnor

1 disobeyed a trial court order after a tribal court issued a contrary order. *See Spear v.*  
2 *McDermott*, 1996-NMCA-048, ¶¶ 32, 37, 121 N.M. 609, 916 P.2d 228.

3 {14} He also argues that courts in other jurisdictions have, for example, held an attorney  
4 in contempt for failing to implement the requirements of a judgment, *see Rintin Corp., S.A.*  
5 *v. Domar, Ltd.*, 403 F. Supp. 2d 1201, 1205-06 (S.D. Fla. 2005), and held an inmate in  
6 contempt for failing to comply with an order of an appellate court by filing a complaint  
7 without submitting the complaint to the trial court for approval before filing, *see Sims v.*  
8 *Bramer*, 827 N.E.2d 1187, 1189-90 (Ind. Ct. App. 2005). He also alerts us to a case in  
9 which a judge was not disciplined for warning a defense attorney, who argued on appeal  
10 that the judge had tricked the defendant into pleading guilty, that if the attorney made  
11 further unsubstantiated claims, the judge would pursue contempt proceedings. *See In re*  
12 *Buford*, 577 S.W.2d 809, 838 (Mo. 1979) (en banc).

13 {15} In addition to its findings supporting its conclusions that Respondent acted  
14 incorrectly when he charged the attorneys with contempt, the Commission also found that  
15 Respondent decided to charge the attorneys with indirect contempt at the sentencing  
16 hearing based on a combination of factors: his suspicion that Mr. Jacquez had not moved  
17 to dismiss the appeal because he was unprepared; his belief that Ms. Milner and Mr.  
18 Jacquez had misrepresented municipal court procedures to the district court; his research  
19 on the issue of what he could do if he believed his decisions were being nullified; and his  
20 research on the issue of indirect contempt.

21 {16} These findings were supported by Respondent's uncontradicted testimony before  
22 the Commission that before charging the attorneys with contempt, he researched what

1 action he could take if he discovered that Mr. Jacquez had entered into a plea agreement  
2 because he was unprepared. He suspected that the attorney could be sanctioned by the  
3 Disciplinary Board, but he also believed he could hold the attorneys in indirect contempt  
4 if they had attempted to confer jurisdiction on the district court by stipulation. In  
5 researching the issue, he consulted with attorneys from the Municipal League and the  
6 Attorney General's Office. Respondent testified that the attorney from the Municipal  
7 League told him that he did not "think it was out of line" to issue a contempt citation and  
8 that the attorney from the Attorney General's Office discussed the possibility of filing a  
9 petition for a writ.

10 {17} Applying the law to the facts as found, we are not persuaded that clear and  
11 convincing evidence demonstrated that Respondent's actions constituted willful  
12 misconduct in office. However, because he failed to procure the transcript of the district  
13 court proceedings to ascertain the facts before acting on his suspicions that the attorneys  
14 were ignoring or attempting to circumvent his order, his actions were negligent. Yet  
15 negligence is not sufficient to conclude that he engaged in willful misconduct. *See In re*  
16 *Martinez*, 99 N.M. at 203, 656 P.2d at 866.

17 {18} We emphasize that Respondent has not informed us of a case, and we are not aware  
18 of one, that has specifically upheld a judge's order holding an attorney in contempt for  
19 filing an appeal from that judge's order, and we do not wish to encourage such a course of  
20 action. We recognize that the exercise of a court's criminal contempt power "is intended  
21 to preserve the authority of and respect for the courts," *Wisniewski*, 103 N.M. at 434, 708  
22 P.2d at 1035. Indeed, in *Wisniewski*, this Court upheld the district court's contempt

1 citations against prosecuting attorneys who disobeyed discovery orders. *Id.* at 435, 708  
2 P.2d at 1036. A court is also justified in holding the parties themselves in civil contempt  
3 for disobeying court orders. *See, e.g., State ex rel. Taylor v. Johnson*, 1998-NMSC-015, ¶  
4 65, 125 N.M. 343, 961 P.2d 768.

5 {19} In this case, however, neither attorney was clearly disobeying a court order.  
6 Technically, this was an appeal—albeit an appeal from a judgment that Respondent did not  
7 believe was appealable, and an appeal in which Respondent believed that the attorneys  
8 were attempting to overturn a judgment by misrepresenting what had occurred in his court.  
9 Challenging a judgment by appealing is not the same as disobeying a court order, even if  
10 there is no right to such an appeal. In circumstances like those in this case, when a judge  
11 suspects that an attorney has violated a duty of competence, diligence, or candor toward the  
12 court, the preferred course of action is to report the attorney to the Disciplinary Board. And  
13 we note that Respondent testified to the Commission that he considered such a course of  
14 action. Under Rule 17-102 NMRA, the Disciplinary Board has “the power and duty . . .  
15 to consider and investigate the conduct of any attorney within the jurisdiction of the  
16 Supreme Court.” Rule 17-205 NMRA states that violations of the Rules of Professional  
17 Conduct “shall be grounds for discipline.” Thus, if Respondent believed that either or both  
18 of the attorneys had violated the Rules of Professional Conduct, it would have been  
19 reasonable of him to report either or both to the Disciplinary Board.

20 {20} Insofar as the Commission determined that Respondent’s admitted anger during the  
21 sentencing hearing violated his duty under Rule 21-300(B)(4), the Commission’s findings  
22 do not show that Respondent’s anger was expressed in a manner that constituted a willful

1 violation of his duty to be dignified and courteous. Although the Commission found that  
2 Respondent acknowledged he had been angry and upset in open court, the findings do not  
3 state that Respondent was abusive.

4 {21} We have previously reprimanded a judge for raising his voice in court to an attorney,  
5 admonishing the attorney in front of her client, and preventing her from making full  
6 objections. *In re Ramirez*, 2006-NMSC-021, ¶ 3, 139 N.M. 529, 135 P.3d 230 (per  
7 curiam). We emphasized in that case that “[t]he most troubling aspect of [the judge’s]  
8 behavior toward the attorney appearing before him was that [the judge’s] actions prevented  
9 the attorney from making her full objections for the record.” *Id.* ¶ 14. And we stated that  
10 “[j]udicial outbursts that interfere with this common, necessary element of trial proceedings  
11 will not be condoned.” *Id.* (citing Rule 21-300(B)(7) NMRA).

12 {22} In this case, although Ms. Milner testified that she was unable to respond to the  
13 judge’s questions, Mr. Jacquez testified that Ms. Milner had explained what had occurred  
14 in district court and that he had explained that he had moved to dismiss the appeal because  
15 the defendant had pled guilty. And although Ms. Milner believed Respondent was angry,  
16 she was unable to testify that he actually raised his voice. Moreover, the testimony of other  
17 attorneys present in the courtroom indicated that the judge did not shout at the attorneys or  
18 appear disrespectful. Accordingly, we are not persuaded that there was clear and  
19 convincing evidence to support a determination that Respondent’s conduct constituted a  
20 willful violation of his duty to be courteous to lawyers.

#### 21 **Recusal**

22 {23} The Commission concluded that by not recusing himself in the contempt case

1 against Mr. Jacquez and Ms. Milner, Respondent violated Rules 21-300(B)(1),(2), 21-  
2 400(A)(1) NMRA. Rule 21-300(B)(1) provides that “[a] judge shall hear and decide  
3 matters assigned to the judge except those in which disqualification is required.” Rule 21-  
4 300(B)(2) provides that “[a] judge shall be faithful to the law and maintain professional  
5 competence in it. A judge shall not be swayed by partisan interests, public clamor or fear  
6 of criticism.” Rule 21-400(A)(1) provides that a judge shall recuse himself or herself when  
7 the judge’s impartiality might be questioned, including when “the judge has a personal bias  
8 or prejudice concerning a party or a party’s lawyer.”

9 {24} The Commission found that after charging the attorneys with indirect contempt on  
10 October 25, 2004, Respondent reviewed the record and decided to dismiss the charges. The  
11 findings state that even though he had decided to dismiss the charges after reviewing the  
12 transcript on November 4, 2004, Respondent continued to take actions in the case.  
13 Specifically, the Commission found that Respondent scheduled a pre-trial conference,  
14 vacated it, set both cases for trial, vacated both trial settings and rescheduled them before  
15 dismissing the contempt charges on December 8, 2004. Because Respondent  
16 acknowledged that he should have recused himself in any further contempt proceedings,  
17 the Commission found that he improperly failed to recuse and violated the Code of Judicial  
18 Conduct. The Commission also concluded that the judge’s conduct “was established by  
19 clear and convincing evidence and constituted willful misconduct in office.” We assume,  
20 without deciding, that Respondent was required to recuse from the contempt proceedings.  
21 *See State v. Stout*, 100 N.M. 472, 475, 672 P.2d 645, 648 (1983). However, our review of  
22 the evidence does not support the finding that he continued to take actions in the case

1 before dismissing it.

2 {25} While it is undisputed that additional hearings were set before the case was  
3 dismissed, Respondent testified before the Commission that the pretrial hearing and a trial  
4 setting were automatically scheduled by the clerk's office. No evidence presented at the  
5 hearing challenged this explanation. Respondent also testified that he resolved to dismiss  
6 the contempt charges as soon as he read the transcript of the district court proceedings and  
7 informed the City Attorney's office of his intent; he also acknowledged that he neglected  
8 to inform Ms. Milner. While a better course of action would have been to enter an order  
9 dismissing the case immediately upon deciding to do so, it is undisputed that no further  
10 hearings actually occurred before the case was dismissed. Consequently, there is not clear  
11 and convincing evidence to support a legal conclusion that Respondent committed willful  
12 misconduct in office by acting in a case in which he knew he should have recused himself.

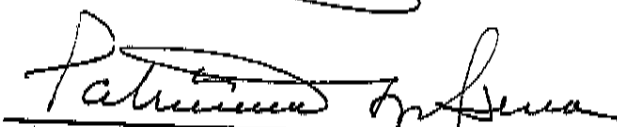
### 13 CONCLUSION

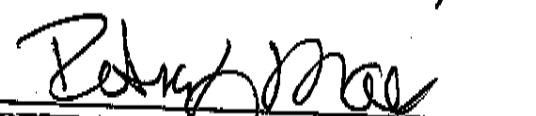
14 {26} We conclude that the Commission has not shown by clear and convincing evidence  
15 that Respondent's conduct constituted willful misconduct in office, which is the  
16 requirement for the serious matter of disciplining or removing an elected judge from office  
17 provided by the New Mexico Constitution. While Respondent acted negligently, both in  
18 charging the attorneys with indirect contempt and in failing to dismiss the case promptly,  
19 that conduct is not grounds for discipline under Article VI, Section 32 of the New Mexico  
20 Constitution. We therefore deny the relief requested because the Judicial Standards  
21 Commission failed to prove willful misconduct by clear and convincing evidence.

22 {27} **IT IS SO ORDERED.**

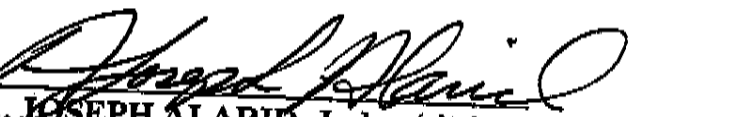
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**EDWARD L. CHAVEZ, Chief Justice**

  
**PATRICIO M. SERNA, Justice**

  
**PETRA JIMENEZ MAES, Justice**

  
**RICHARD C. BOSSON, Justice**

  
**A. JOSEPH ALARID, Judge (sitting by designation)**