CASE LAW UPDATE:

DISCIPLINARY ACTIONS INVOLVING IMPAIRED ATTORNEYS

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INTRODUCTION

During the past year, courts have refined and clarified their disciplinary mitigation standards, procedures and requirements for chemically dependent attorneys who have committed professional misconduct. Generally, jurisdictions allow for mitigation of disciplinary sanctions if the alcoholism was a substantial factor in the misconduct, and if the respondent attorney has made efforts towards rehabilitation. See, e.g., Matter of Rosenberg, 596 N.Y.S.2d 564 (A.D. 3 Dept. 1993), Matter of Blasig, 846 P.2d 822 (Ariz. 1993).

The supreme courts of Florida and Kansas have specifically expressed that each attorney discipline case will be viewed solely on the merits presented, and that sanctions in other disciplinary proceedings do not control. The Florida Bar v. Marcus, 616 So.2d 975 (Fla. 1993); Matter of Jones, 843 P.2d 709 (Kan. 1992).

Kansas has also addressed the issue of whether addiction to a substance that is "unlawful to purchase, possess, or use" should be a mitigating factor. Matter of Jones, 843 P.2d 709 (Kan. 1992).

The District of Columbia Court of Appeals has drawn a distinction between acts involving moral turpitude and conviction for crimes involving moral turpitude, and has structured sanctions accordingly. In re Hopmayer, 625 A.2d 290 (D.C. App. 1993). How the criminal judicial process relates to the discipline of impaired attorneys and the premise that the goal of attorney discipline is
to protect the public, rather than to punish the individual attorney, raises issues ripe for review. What is the correlation between a felony conviction, the sentence, and the disciplinary sanctions imposed? See, e.g., Disciplinary Counsel v. Lucey, 586 N.E.2d 78 (Ohio 1992) (suspending rather than disbarring attorney convicted of felonious assault); Disciplinary Action Against Anderly, 481 N.W.2d 366 (Minn. 1992) (noting that absent significant mitigating factors, felony conviction warrants disbarment). Is possession of drugs a crime of moral turpitude? Is it possible to consider a possession offense a crime of moral turpitude if the perpetrator is an addict?

ATLANTIC REPORTER

District of Columbia

In re Hopmayer, 625 A.2d 290 (D.C. App. 1993)

Following remand of a disciplinary case, In re Hopmayer, 602 A.2d 655 (D.C. App. 1992), the court of appeals held that conviction of a crime involving moral turpitude requires disbarment, regardless of any mitigating factors such as alcoholism. The District of Columbia Court of Appeals upheld the mandatory language of the statute requiring disbarment.

For purposes of attorney discipline, the court drew a distinction between acts involving moral turpitude and conviction of a crime involving moral turpitude. Disbarment is mandated by statute for conviction of a crime involving moral turpitude. Acts involving moral turpitude do not always require disbarment, as disciplinary sanctions may be mitigated by alcoholism and recovery. However, conviction of a crime involving moral turpitude requires disbarment, regardless of any mitigating factors such as alcoholism.

New Jersey

Matter of Karwell, 620 A.2d 1048 (N.J. 1993)

An attorney with over fifteen years of sobriety, who was active in efforts to help others deal with substance abuse, was
found to be in possession of a small amount of narcotics and drug paraphernalia during a routine courtroom security check. The court considered the attorney’s active efforts to overcome his own alcohol and drug dependency and his efforts to assist others. The attorney was admitted into a pretrial intervention program, subject to a plan of counselling and supervision. The Disciplinary Review Board suspended the attorney from practice for three months. Three members of the DRB dissented— one recommending a public reprimand only; one recommending imposition of a one month suspension, and one recommending that the imposition of the three month suspension be suspended.

Maryland

Attorney Grievance Comm’n v. White, 614 A.2d 955 (Md. 1992)

An attorney misappropriated client funds, then replaced them with interest before becoming aware of any disciplinary proceedings against him. The attorney claimed his alcoholism contributed to his misconduct and offered the alcoholism and subsequent treatment as mitigating factors. The court acknowledged that where alcoholism is implicated in cases involving misappropriation of client trust funds, a sanction less severe than disbarment may be imposed if the evidence discloses that the alcoholism, to a substantial extent, was the "responsible, the precipitating, the root cause of the misappropriation." However, the court took into consideration that the attorney carried on an effective law practice for a substantial period during the time of the misconduct without any adverse effect on the lawyer’s clients. The court held that showing that the attorney was in the throes of alcoholism and that his thinking was alcoholically impaired at the time of the misconduct was insufficient mitigation to justify a sanction less than disbarment. Accordingly, the attorney was ordered disbarred.

NORTHEASTERN REPORTER

Ohio

Disciplinary Counsel v. Columbro, 611 N.E.2d 302 (Ohio 1993)

An assistant prosecuting attorney who committed theft and drug abuse while in office was granted an indefinite suspension...
rather than disbarment when evidence demonstrated the offenses were products of his substance dependency, he admitted his addiction, sought professional help and began to make inroads towards rehabilitation. When imposing the indefinite suspension, the court noted that "to take all hope away from this, as the record reflects, recovering individual, would not be tempering justice with mercy."

Disciplinary Counsel v. Casalinuovo, 613 N.E.2d 177 (Ohio 1993)

An attorney indicted for drug abuse, a fourth degree felony, was found by the court to be eligible for treatment in lieu of conviction, and criminal proceedings were stayed. In addition, the attorney was charged in a complaint with engaging in illegal conduct involving moral turpitude and in conduct that adversely reflected on his fitness to practice law. After completion of a treatment program and demonstrated participation in, and maintenance of psychotherapy and AA meetings, the indictment was dismissed. The Board of Commissioners imposed a two-year suspension, with the entire suspension stayed, placed the attorney on probation, conditions of which included that the attorney remain drug and alcohol free, be subject to random drug testing, continue checking in with a psychologist on at least a quarterly basis, and continue to attend weekly AA meetings. Violation of any of the conditions would automatically result in the imposition of the two year term of suspension.

Darke County Bar Ass'n v. Brumbaugh, 602 N.E.2d 606 (Ohio 1992)

An attorney whose neglect of legal matters was attributable in part to his alcoholism was given a suspended sanction of a six months suspension. Between the time that the misconduct occurred and the date the case was heard before the court, the attorney had completed an inpatient treatment program and continued to participate in outpatient therapy and support groups. In addition, restitution to clients was almost complete by the time of trial. The court ordered that the remaining $150 owed in advanced attorney fees be repaid to the aggrieved client.

Disciplinary Counsel v. Lucev, 586 N.E.2d 78 (Ohio 1992)

An intoxicated attorney who stabbed his wife was indicted by a grand jury for felonious assault, was convicted by the court of aggravated assault, and sentenced to a term of one to five years.
The sentence was suspended and the attorney was placed on three years probation, conditioned on alcohol treatment and counselling, and community service. The Supreme Court held that indefinite suspension from the practice of law was warranted, with reinstatement conditioned upon proof of regular attendance at Alcoholic Anonymous meetings and proof of a sober lifestyle for at least six months prior to application for reinstatement.

Indiana

In the Matter of Kristoff, 611 N.E.2d 116 (Ind. 1993)

In determining disciplinary sanctions, the Supreme Court of Indiana considers several factors including the recommendation from the hearing officer, the type of offense, injuries incurred, the state of mind of the Respondent, the duty of the court to preserve the integrity of the profession, the risk to the public, and matters in mitigation, extenuation or aggravation. An attorney who commingled client funds, committed a criminal act of theft and engaged in conduct prejudicial to the administration of justice was suspended for one year, upon consideration of his alcoholism, subsequent efforts at rehabilitation and eventual restitution.

In the Matter of Stover-Pock, 604 N.E.2d 606 (Ind. 1992)

Affirming its duty to safeguard the public from unfit lawyers, whatever the cause of the unfitness may be, The Supreme Court of Indians imposed a three year suspension upon an attorney whose misconduct related to a chronic medical condition and opiate addiction. Disciplinary proceedings were brought against an attorney stemming from two felony criminal convictions for possession of a controlled substance, forgery, and obtaining a controlled substance by fraud or deceit. She received a suspended sentence and was placed on probation. In determining the disciplinary sanction to be imposed, the court took into consideration the fact that, since the time of her arrest, the attorney had successfully completed treatment for her addiction and depression.

NEW YORK STATE

Rehabilitation and recovery from alcoholism, drug addiction
and psychological problems are mitigating factors in attorney discipline for misconduct of varying degrees of severity.

**Matter of Rosenberg, 596 N.Y.S.2d 564 (A.D. 3 Dept. 1993)**

Attorney Rosenberg was found guilty of serious professional misconduct involving conversion of client funds. His misconduct was aggravated by his prior disciplinary record, but was mitigated by the steps he had taken to deal with his alcohol problem. Rosenberg had a long disciplinary history, but raised his alcoholism as an issue of mitigation for the first time in this case. The court noted that he "does not attempt to use his alcoholism as an excuse but as an explanation. He also recognizes that alcoholism itself may be symptomatic of an underlying disorder. It appears respondent recognized his alcoholism problem around the time of his examination under oath by petitioner in December 1991. Most importantly, he has taken steps to deal with the problem. He is actively participating in Alcoholics Anonymous and other therapy sessions and...he agreed in writing to comply with the requirements of the recovery and monitoring program of the Lawyer Assistance Program of the New York State Bar Association."

The court suspended Rosenberg for one year and conditioned his reinstatement upon submission of proof that "he is continuing to take appropriate and effective steps to maintain his sobriety and to prevent a recurrence of the kinds of professional misconduct for which he has been and is being disciplined, including continuing compliance with the recovery and monitoring program of the NYSBA Lawyer Assistance Program."


Attorney Kohler was found guilty of numerous violations of the disciplinary rules and rules of professional responsibility, including illegal conduct involving moral turpitude, commingling client funds, and conduct involving dishonesty and misrepresentation. Kohler offered as mitigation that at the time of the misconduct he was suffering from the disease of alcoholism, that he was under extreme financial pressure, and that he was suffering from deep-seated psychological problems. The court considered Kohler’s completion of a substance abuse program, his enhancement of his "sober support network" through attendance at weekly meetings of Alcoholics Anonymous, reports from his psychologist, and imposed a two year suspension.
See also Matter of Weinstein, 585 N.Y.S.2d 190 (A.D. 1 Dept. 1992) (imposing six month retroactive suspension and reinstating attorney when attorney "rid himself of reliance on drugs and alcohol" and stated willingness for pro bono involvement with organization helpful in rehabilitation); Matter of Holm, 579 N.Y.S.2d 293 (A.D. 4 Dept. 1992) (holding misconduct to which drug and alcohol abuse contributed to a large measure warrants sanction of censure when client did not sustain any loss, when misconduct does not involve misappropriation of funds, and professional assistance and hospitalization sought and received).

SOUTHERN REPORTER

Florida

The Florida Bar v. Bazley, 597 So.2d 796 (Fla. 1992)

An attorney with a prior reprimand failed to timely inform a client that there was no basis for the client’s claim, and thereafter misrepresented the status of the client’s claim. The client suffered no injury, and the attorney’s alcohol abuse may have contributed to the misconduct. The referee in the disciplinary proceeding considered: the attorney had a prior reprimand for neglect of a matter, although at the time of the mistake he was relatively inexperienced; he did not have the benefit of a supervising attorney or associate with whom he could consult; by his own admission he was drinking heavily during the period on question; he caused no injury as a result of his conduct; that he was remorseful; and he was receiving treatment for his alcohol abuse. Although the referee recommended a thirty day suspension with an eighteen month probation, the Bar asked to increase the penalty to an eighteen month suspension.

Relying on a referee’s order suspending a lawyer for eight months in a previous case with almost identical facts, (The Florida Bar v. Palmer, 504 So.2d 752 (Fla. 1987)) the Court ordered an eight month suspension to be followed with an eighteen month probation for the respondent attorney in the case at bar. In Palmer, however, the attorney did not offer alcoholism as a mitigating factor, but raised the issue of the illness and death of his mother during the time of his misconduct. The court did not
consider this personal plight and loss a mitigating factor.

The Florida Bar v. Marcus, 616 So.2d 975 (Fla. 1993)

The Supreme Court of Florida rejects an automatic disbarment rule for attorneys who are convicted of a felony. Instead, the court continues to view each case solely on the merits presented.

The Florida Bar filed a complaint against attorney Marcus relating to misappropriation of client funds. The court appointed a referee to conduct the disciplinary proceedings. At the final hearing in May, 1988, Marcus entered an Unconditional Guilty Plea and Consent Judgment which provided for an eighteen month suspension with a lifetime probation for substance abuse. The report of the referee, filed in May, 1989, found Marcus guilty of violations including committing acts involving fraud, deceit and misrepresentation.

The court requested briefs from Marcus and from the Bar as to the discipline recommended by the referee. Marcus filed a motion seeking remand to the referee for an evidentiary hearing, noting that because of his agreement with the Bar, Marcus had not presented mitigating evidence that would indicate he was acting under the influence of cocaine at the time he misappropriated funds, nor had he presented any evidence of his subsequent recovery. The Bar requested that it be allowed to present additional evidence of aggravation. In November of 1989, the court remanded the cause to the referee for an evidentiary hearing. The evidentiary hearing was held in July, 1990, but a report was not submitted to the court until a request was made in January, 1992.

During the time between the report being issued and the report being submitted to the court, Marcus plead guilty to one felony count in a nine count indictment related to the misappropriation of client funds. Upon the Bar’s filing of a Notice of Determination of Guilt, the court suspended Marcus from the practice of law. The Bar asked the court to take judicial notice of these facts, and to supplement the record to include the felony conviction and the order of suspension.

From the July, 1990 evidentiary hearing, the referee reported that there was a direct causal link between Marcus’ misconduct and his addiction to cocaine. The report also noted Marcus’ participation in Narcotics Anonymous, his successful completion of a two year contract with the Florida Lawyers Assistance Corporation and his voluntary continued association with his assigned monitor,
his active and helpful role in the recovery of other suffering addicts, his current responsible performance in the community as an attorney, and his full restitution to the harmed parties. The referee recommended an eighteen month suspension with a three year probation, during which time Marcus would be required to complete a Florida Lawyers Assistance, Inc. rehabilitation program. The Bar argued that Marcus must be disbarred, as disbarment is the recommended sanction for one convicted of a felony and one who has stolen or misappropriated clients' funds. The Bar cited The Florida Bar v. Shuminer, 567 So.2d 430 (Fla. 1990) and The Florida Bar v. Knowles, 500 So.2d 140 (Fla. 1986), in which the court directed disbarment because the evidence indicated that the lawyers continued to work effectively during the time of the misappropriation and failed to establish that their addictions rose to a sufficient level of impairment to outweigh the seriousness of the offenses.

The court acknowledged that misappropriation of client funds is one of the most serious offenses a lawyer can commit and absent sufficient mitigating factors compels the extreme sanction of disbarment. In this case, the court found that the mitigating factors of cocaine addiction, successful rehabilitation, the lengthy delay in resolving the matter, the full and early restitution, and the previous consent judgment warrant the imposition of less than the presumed discipline of disbarment. The court held that Marcus' conduct during the lengthy resolution of this matter supported the referee's findings, and ordered a three year suspension nunc pro tunc December 1991, followed by a three year period of probation with required quarterly drug testing.

SOUTHEASTERN REPORTER

West Virginia

Committee on Legal Ethics v. Lambert, 428 S.E.2d 65 (W.Va. 1993)

In West Virginia, an attorney's license was annulled for violations including conversion of client's property, causing a forged instrument to be uttered, failing to pay over money received on behalf of a client, and failing to inform the Committee during reinstatement proceedings that he owed clients money; despite the
attorney's contention that his alcoholism should be a mitigating factor.

In rejecting Lambert's mitigation defense, the Supreme Court of West Virginia noted "[t]he Committee contends that an attorney should not be able to cavalierly defend charges so serious as forgery and theft of client monies by simply invoking a past history of alcohol abuse. The Committee argues that such evidence in mitigation should only be deemed persuasive when the attorney has acknowledged the wrong, has remedied the problem which led to the wrong and has otherwise convinced the Committee that such misconduct is not likely to recur in the future...The respondent has demonstrated through his behavior towards his clients and throughout these proceedings, a total disregard for the Code of Professional Responsibility and the laws of this State."

NORTHWESTERN REPORTER

Minnesota

Disciplinary Action Against Anderly, 481 N.W.2d 366 (Minn. 1992)

The Supreme Court of Minnesota held that a felony conviction warrants disbarment, unless significant mitigating factors exist.

The court granted an order suspending Anderly from the practice of law during the pendency of disciplinary proceedings on June 7, 1991. (In re Anderly, 471 N.W.2d 104 (Minn. 1991). This action came before the court upon the referee's report and recommendation of disbarment.

Anderly was found guilty of serious misconduct involving misappropriation of client funds, and was also convicted of a felony in federal court related to the misconduct. The court acknowledged that while it appeared Anderly suffered in some degree from alcoholism, he needed to establish something more than the fact that he is an alcoholic. "For alcoholism to be a mitigating factor, the attorney must prove by clear and convincing evidence that (1) he is affected by alcoholism, (2) the alcoholism caused the misconduct, (3) he is recovering from alcoholism, (4) the recovery has arrested the misconduct, a (5) the misconduct is not apt to recur." In re Johnson, 322 N.W.2d 616 (Minn. 1982). "The key factor here is causation, as alcoholism itself is not a defense to misconduct." Id. The referee in Anderly found that the alcoholism
did not cause the misconduct, and the court was not willing to disregard this finding based on the testimony of the doctor who treated Anderly for his alcoholism. Accordingly, Anderly was disbarred.

Iowa


"Occasionally a case arises with facts so egregious that although tragic, they cry out for disbarment." In re X, 577 A.2d 139 (N.J. 1990). Disbarring Sturgeon and rejecting the recommendation by the referee for suspension, the Supreme Court of Iowa held Sturgeon to be one such case. Sturgeon threatened to kill persons he believed responsible for his wife's drug problem, was found in possession of loaded revolvers with hollow point bullets and without permits, and attempted to break down the front door of two of the intended victims. Respondent Sturgeon had been drinking heavily on the day in question, and does not have a conscious memory of the conversation involving the plan to kill people on his "hate list". During the ensuing criminal proceedings the district court deferred adjudication and placed Sturgeon on probation for five years conditioned upon his treatment for alcoholism.

In determining the disciplinary sanctions, the court considered Sturgeon's efforts at rehabilitation and his attempts to "turn his life around". However, considering his conduct to be so egregious, the court felt compelled to disbar Sturgeon in spite of his efforts at rehabilitation. A discipline less than disbarment "would send the wrong message not only to the public but to the intended victims." Accordingly, Sturgeon was disbarred.


Barrer was suspended indefinitely for conduct involving moral turpitude relating to his harassment of high school age boys. The Supreme Court of Iowa acknowledged Barrer's mental problems and alcoholism, and allowed for the possibility that these would block Barrer's intent to commit any unlawful activity. However, the court held that while intent is a critical element in criminal
cases, it is not the overriding concern in ethics cases. Interpreting the purpose of the Iowa State Bar Association Lawyers Helping Lawyers Committee as ameliorative rather than supervisory in nature, the court held that acting as a supervising agency to Barrer was beyond the group’s scope.

Wisconsin

The following cases demonstrate the standard for mitigation in Wisconsin—there must be a causal connection between the alcoholism and the misconduct, and the impaired attorney must demonstrate serious efforts at rehabilitation.

Disciplinary Proceedings Against Rutgers, 500 N.W.2d 673 (Wis. 1993)

In this case, Rutgers’ misconduct included repeated neglect of legal matters entrusted to him, failure to respond to clients’ requests for information regarding the status of their cases, and failure to provide adequate representation. When determining sanctions, the court considered the referee’s findings that alcoholism was a substantial factor of the misconduct, and that Rutgers had made successful efforts at rehabilitation from his alcoholism. The disciplinary board argued that the "substantial factor" language in the referee’s report fell short of a causation nexus, and consequently, Rutgers’ alcoholism was not a defense to the misconduct. Rutgers requested that the court establish in the context of this proceeding a procedure for dealing with attorneys recovering from chemical dependency who have engaged in misconduct. He specifically requested the establishment of a procedure that would differentiate between attorneys pursuing recovery for their chemical dependency and those who claim chemical dependency but do not seek treatment.

The court did not express a standard or general procedure for dealing with chemically dependent attorneys who have committed professional misconduct. The court did, however, adopt the referee’s findings of fact and law, consider all mitigating and aggravating factors, and suspend Rutgers for one year, followed by a two year conditional probation.
Disciplinary Proceedings Against Cassidy, 493 N.W.2d 362 (Wis. 1992)

The court acknowledged that alcoholism may be considered in mitigation of attorney discipline if the alcoholic has recognized his problem, sought treatment for it, and established a period of abstinence from alcohol. However, agreeing with the referee's findings that attorney Cassidy had not "come to grips" with his alcoholism, and that the underlying dishonesty common to all of his acts of professional misconduct was not caused by his alcoholism, the court rejected Cassidy's mitigation argument and revoked his license.

PACIFIC REPORTER

Arizona

The Disciplinary Commission of the Supreme Court of Arizona utilizes sobriety monitors as supervisors as one of the terms of probation for alcoholic attorneys seeking reinstatement after suspension.


Blasnig's misconduct was aggravated by a pattern of misconduct, commission of multiple offenses, and a prior reprimand, and mitigated by a lack of a dishonest or selfish motive, exhibition of remorse, alcoholism and attendance at Alcoholics Anonymous meetings, and voluntary contact of the State Bar concerning disciplinary charges. Noting that the "purpose of lawyer discipline is not to punish the offender, but to protect the public, the profession, and the administration of justice," the commission imposed a two year retroactive suspension and a two year probation conditioned in part upon supervision by a "practice monitor" and a "sobriety monitor".

Matter of Loftus, 832 P.2d 689 (Ariz. 1992)

A significant procedural holding of this case is that an attorney who does not offer evidence to refute allegations in disciplinary proceedings waives his or her right to a hearing on the allegations, even if the Bar Hearing Committee finds that the attorney was unable to participate in his or her own defense due to
alcoholism.

Despite the lack of significant harm to former clients and the attorney’s subsequent rehabilitation from alcoholism, the court imposed a two year retroactive suspension followed by a one year probation conditioned in part upon supervision by both "practice" and "sobriety" monitors.

Oklahoma


Alcoholism is not by itself enough to mitigate disciplinary sanctions, but the attorney’s recognition of his affliction, pursuit and cooperation in treatment, and willingness to be supervised persuaded the court that a less harsh discipline than the presumptive suspension was warranted. Noting that Donnelly’s misconduct was not especially serious, and was a product of his alcoholism, the court ordered that Donnelly be publicly reprimanded, that he be supervised by a member of the Lawyers Helping Lawyers Committee for one year, that he attend meetings of Alcoholics Anonymous, and that he pay the costs of the court proceedings.

Colorado

People v. Holt, 832 P.2d 948 (Colo. 1992)

When attorneys intentionally violate the law, they are subject to the severest discipline. In Holt, the court considered several mitigating factors, including the absence of a disciplinary record, the absence of a dishonest or selfish motive in the respondent’s use of illegal drugs and failure to pay taxes, existence of personal or emotional problems, a good faith effort to rectify the misconduct, interim rehabilitation through abstinence from drug use and therapy, and the remoteness of the offenses in that three years had passed between the time of the misconduct and the time of these proceedings. The court held that although no specific client was harmed by the respondent’s misconduct, that fact missed the point of attorney discipline, which is the protection of the public. In light of the mitigating circumstances, the court replaced the presumptive three-year suspension with a suspension for one year and one day.
Kansas

Matter of Morris, 834 P.2d 384 (Kan. 1992)

Although attorney Morris committed several acts of misconduct that could warrant disbarment, the court noted that "his accomplice was drug addiction." Imposing a three-year suspension, the court adopted the findings of the disciplinary panel which commented in part on the devastating effects of chemical dependency. "The devastating and destructive effects of substance abuse and total addiction are dramatically illustrated through the respondent's personal account of his self-destruction as a person and an attorney."

Matter of Jones, 843 P.2d 709 (Kan. 1992)

In a later case, the Supreme Court of Kansas held that respondent's misappropriation of money from his employer, in a large part to purchase cocaine for personal use, and his lack of restitution, warranted disbarment. In Jones, the court considered all the mitigating and aggravating factors that would effect the presumptive disbarment for conduct involving serious breach of the disciplinary rules. Relying on other jurisdictions to address whether addiction to a drug that is illegal to purchase, possess or use is an aggravating or mitigating circumstance, the court noted that the addiction in this case was acquired through recreational use for pleasure. The court allowed rehabilitation from addiction to serve as a mitigating factor, but did not consider addiction to cocaine a mitigating factor. Accordingly, Jones was disbarred.

--- Compiled by Tricia Heil, September 1, 1993