Section III
Legal actions for Soldiers

10–11. Law enforcement relationship to the Army Substance Abuse Program

a. It is Army policy to encourage voluntary entry into the ASAP. The MP, USACIDC special agents, and other investigative personnel will not solicit information from clients in the program, unless they volunteer to provide information and assistance. If the client volunteers, the information will not be obtained in the counseling center or in such a manner as to jeopardize the safety of sources of the information or compromise the confidentiality and credibility of the ASAP (AR 190–30 and 195–2).

b. Title 42, Code of Federal Regulations, prohibits undercover agents from enrolling or otherwise infiltrating an alcohol or other drug treatment or rehabilitation program for the purpose of law enforcement activities. This restriction does not preclude the enrollment in the ASAP, for rehabilitation purposes, of MP, USACIDC, or other investigative personnel who have an actual alcohol or other drug abuse problem. Their law enforcement status must be made known to the ADCO and Clinical Director at the time of their enrollment. These measures are for the protection of the law enforcement client as well as the ASAP.

c. The PM and the ADCO will exchange information for the purpose of identifying drug abuse trends, drug "trouble spots," and high-risk areas to include specific prevention efforts. This may include information on drug prevalence by type of drug, cost, strength and purity, and current drugs of choice. This exchange of information will be specific and will not mention names or social security numbers of any client nor violate program confidentiality.

d. If requested by USACIDC, the ADCO will provide a report that contains the number and type of drug positives by unit, excluding positive results for drugs that must be medically reviewed until the medical review has been completed. The report will not contain Soldier-specific information, such as names or social security numbers.

10–12. Limited Use Policy

The objectives of the Limited Use Policy are to facilitate the ID of Soldiers, who abuse alcohol and other drugs by encouraging ID through self-referral to facilitate the rehabilitation of those abusers who demonstrate the potential for rehabilitation and retention. When applied properly, the Limited Use Policy does not conflict with the Army's mission or standards of discipline. It is not intended to protect a member who is attempting to avoid disciplinary or adverse administrative action.

10–13. Definition of the Limited Use Policy

a. Unless waived under the circumstances listed in paragraph 10–13d of this regulation, Limited Use Policy prohibits the use by the government of protected evidence against a Soldier in actions under the UCMJ or on the issue of characterization of service in administrative proceedings. Additionally, the policy limits the characterization of discharge to "Honorable" if protected evidence is used. Protected evidence under this policy is limited to:

(1) Results of command-directed drug or alcohol testing that are inadmissible under the MRE. Commanders are encouraged to use drug or alcohol testing when there is a reasonable suspicion that a Soldier is using a controlled substance or has a blood alcohol level of .05 percent or above while on duty. This information will assist a commander in his determination of the need for counseling, rehabilitation, or medical treatment. Competence for duty tests may be directed if, for example a Soldier exhibits aberrant, bizarre, or uncharacteristic behavior, but PO to believe the Soldier has violated the UCMJ through the abuse of alcohol or drugs is absent. Competence for duty test results may be used as a basis for administrative action to include separation, but shall not be used as a basis for an action under the UCMJ or be used to characterize a Soldier's service.

(2) Results of a drug or alcohol test collected solely as part of a safety mishap investigation undertaken for accident analysis and the development of countermeasures is further described in paragraph 4–5.

(3) Information concerning drug or alcohol abuse or possession of drugs incidental to personal use, including the results of a drug or alcohol test, collected as a result of a Soldier's emergency medical care solely for an actual or possible alcohol or other drug overdose. To qualify for Limited Use protection, Soldiers must inform their unit commander of the facts and circumstances concerning the actual or possible overdose. The commander must receive this information as soon after receipt of the emergency treatment as is reasonably possible. If treatment takes place at a civilian facility, the Soldier must give written consent to the treating civilian physician or facility for release of information to the Soldier's unit commander concerning the emergency treatment rendered. If the medical treatment resulted from an apprehension by military or civilian law enforcement authorities, or if the admission for treatment resulted from other than abuse of alcohol or drugs, such as for injuries resulting from a traffic accident, the limited use protection will not be available to the Soldier.

(4) A Soldier's self-referral to the ASAP.

(5) Admissions and other information concerning alcohol or other drug abuse or possession of drugs incidental to personal use occurring prior to the date of initial referral to the ASAP and provided by Soldiers as part of their initial entry into the ASAP. This includes an enrolled Soldier's admission to a physician or ASAP counselor concerning alcohol or other drug abuse incidental to personal use occurring prior to the initial date of referral to the ASAP.

(6) Drug or alcohol test results, if the Soldier voluntarily submits to a DOD or Army rehabilitation program before the Soldier has received an order to submit for a lawful drug or alcohol test. Voluntary submission includes Soldiers communicating to a member of their chain of command that they desire to be entered into a rehabilitation program. This limited use protection will not apply to test results, which indicate alcohol or other drug abuse occurring after the voluntary submission to the rehabilitation program. Examples: The unit commander has ordered a urinalysis on Monday for all members of the unit (an inspection under MRE 313). Before receiving an order (or having knowledge of a pending test) to appear for the urinalysis, a Soldier approaches the platoon sergeant, admits having used illegal drugs over the weekend, and indicates a desire to receive help. Later that day, the Soldier is ordered to and provides a specimen for the urinalysis, which results in a positive report for cocaine use. Those results are protected by the limited use policy unless there is some evidence that demonstrates the use reflected by the test occurred after the admission was made to the platoon sergeant. Later that week, the commander orders another unit inspection for the following Monday. The inspection is conducted properly under MRE 313, and the Soldier once again has a positive result for cocaine. These test results, as interpreted by an Army Forensic Toxicology Drug Testing Laboratory (FTDTL) expert, indicate the Soldier had used cocaine after admitting use to the platoon sergeant. This test result is not protected by the Limited Use Policy.

(7) The results of a drug or alcohol test administered solely as a required part of a DOD or Army rehabilitation or treatment program.

b. The Limited Use Policy does not prevent a counselor from revealing, to the commander or appropriate authority or others having a need to know, knowledge of certain illegal acts which may compromise or have an adverse impact on mission, national security, or the health and welfare of others. The unit commander will report the information to the appropriate authority. Likewise, information that the client presently possesses illegal drugs or that the client committed an offense while under the influence of alcohol or illegal drugs, other than prior illegal possession incident to the prior use, is not covered under this policy. Limited use is automatic. It is not granted, and it cannot be vacated or withdrawn. It may be waived in the situations described in paragraph 10–13d of this regulation.

c. An order from competent authority to submit to urinalysis or breath or blood alcohol test is presumed a lawful order. Soldiers who fail to obey such orders may be the subject of appropriate disciplinary action under the UCMJ.

d. The Limited Use Policy does not preclude the following:

(1) The introduction of evidence for impeachment or rebuttal purposes in any proceeding in which the evidence of drug abuse (or lack thereof) has first been introduced by the Soldier. This rebuttal or impeachment may include evidence that test data indicate the presence of a controlled substance or alcohol, although not in sufficient quantity to meet the cutoff level for a positive result that has been established by DOD.

(2) The initiation of disciplinary or other action based on independently derived evidence, including evidence of continued drug abuse after initial entry into the ASAP.

e. If the command is made aware of a Soldier's illegal drug use through the Soldier's self-referral and admissions, the requirement to initiate separation proceedings pursuant to the appropriate enlisted or officer separation regulation will not apply. The unit commander may initiate a separation action; however, the information is protected by the Limited Use Policy.

10–14. Implementation of the Limited Use Policy

a. Unit commanders will explain the Limited Use Policy to Soldiers during the commander's interview as set forth in paragraphs 7–9, 15–14, and 16–11 of this regulation. Commanders will not make any agreement, or compromise, or expand the Limited Use Policy in any way.

b. One or more military associates of an actual or possible alcohol or drug overdose victim might be reluctant to assist the victim in obtaining emergency treatment from an MTF because they themselves are abusers of alcohol or other drugs. An assisting person may fear that adverse personal consequences could result from becoming involved. Although Limited Use protection is not extended automatically to such a person, the availability of the following options to those Soldiers and their commanders should reduce reluctance to assist the victim:

(1) Soldiers may seek help for their own alcohol or other drug problem from:

(a) Their unit commander.

(b) The physician at the MTF.

(c) Any other agency or individual described in chapter 7 of this regulation.

(2) If the unit commander suspects a Soldier of alcohol or other drug abuse, or possession of drugs incidental to personal use, solely because of a Soldier's assistance to an actual or possible alcohol or drug overdose victim, and there is no reason to believe the Soldier provided illegal drugs to the victim, the commander should consult with the supporting legal office and thereafter may:

(a) Inform the Soldier of these suspicions.

(b) Ensure the Soldier is aware of the rehabilitation services available and the Limited Use Policy.

(3) If the Soldier admits to alcohol or other drug abuse and volunteers for help, the Limited Use Policy becomes effective as of the time the Soldier asks for help.

c. Soldiers will receive an honorable discharge regardless of their overall performance of duty, if discharge is based

on a proceeding where the Government initially introduces limited use evidence except as authorized in paragraph 10–13d(1) of this regulation. The "Government" includes the following:

(1) The unit commander or intermediate commanders (in a recommendation for discharge or in documents forwarded with such a recommendation).

(2) Any member of the board of officers or an administrative separation board adjudicating the case.

(3) The investigating officer or recorder presenting the case before the board.

(4) The separation authority.

d. Alternatively, if Limited Use evidence is improperly introduced by the Government before the board convenes, the elimination proceeding may be reinitiated, excluding all reference to the evidence protected by the Limited Use Policy. If the Limited Use evidence is improperly introduced by the Government after the board convenes, only a general court-martial convening authority may set aside the board proceeding and refer the case to a new board for rehearing. The normal rules governing rehearings and permissible actions thereafter will apply in accordance with the appropriate enlisted or officer separation regulations.

e. All situations that could arise in applying the Limited Use Policy in the field cannot be foreseen. As in other instances in which regulatory guidance is applied to an actual case, the commander should seek advice from the supporting legal office.

Section IV
Confidentiality regarding military personnel

10–15. Scope

a. This section prescribes policy and provides guidance on the release of information about abusers of alcohol or other drugs who are or have been enrolled in the ASAP. The primary intent of the references in paragraph 10–18 and of the policies in this section is to remove any fear of public disclosure of past or present abuse. It is also intended to encourage participation in a rehabilitation program.

b. The restrictions on disclosure prescribed in this section are allowed by the Freedom of Information Act (5 USC 552), 42 USC Sec 290dd-2 and 42CFR Part 2, and the Privacy Act (5 USC 552a).

c. No person subject to the jurisdiction or control of the Secretary of the Army shall divulge any information or record of identity, diagnosis, prognosis, or treatment of any client. This includes any information which is maintained in connection with alcohol or other drug abuse education, training, rehabilitation, or research, except as authorized in 10–16 through 10–17 below.

10–16. Confidentiality of military client Army Substance Abuse Program information

a. The release and/or discussion of information within the Armed Forces concerning a Soldier's abuse of alcohol and other drugs is governed by the restrictions contained in the 5 USC 552a, 42 USC 290dd-2), AR 40–66, and AR 340–21 and HIPAA. Such information will be made known to those individuals within the Armed Forces who have an official need to know. The restrictions on release of information outside the Armed Forces concerning Soldiers is prescribed by the laws regarding confidentiality of drug and alcohol abuse counseling records and information cited above.

b. Limited Use Policy does not prevent a counselor from revealing, to the appropriate authority, knowledge of illegal acts, which may have an adverse impact on mission, national security, or the health and welfare of others.

(1) ASAP counseling records are protected by the restrictions contained in The Privacy Act (5 USC 552a), 42 USC 290dd-2, AR 40–66 and AR 340–21 and the HIPAA of 1996 (Public Law 104–191 Section 264) and DOD 6025.18–R DOD Health Information Privacy Regulation. These records will be maintained by the ASAP counseling staff and stored for 5 years in accordance with Army Records Information System (ARIMS).

(2) The ASAP Clinical Director will periodically review ASAP client files. He or she will ensure that counselors maintain high ethical standards in recording only relevant ASAP counseling information.

(3) Commanders seeking information from an individual's ASAP record must specify their need to know specific information. Their request must be made to the responsible Clinical Director for proper release of information. Commanders do not have unlimited access to review a client's ASAP counseling notes or records.

(4) For clients in certain sensitive positions or with the PRP, counselors or medical personnel will immediately advise the commander if any information is provided by the client, which would serve to disqualify the person for continuation in any sensitive duty position. If the need to release the information is in doubt, it should be released to the commander based on that requirement to protect the interest of the U.S. Government.

(5) The ASAP is a command program. The rehabilitation process involves the client, his or her unit commander and intermediate supervisors, and the counseling staff. Normally, there is no reason for anyone other than these individuals to learn of a Soldier's alcohol or other drug-problem. While commanders above the battalion level may on rare occasions have an official need to know the specific identity of an abuser within their commands, their knowledge of the number of abusers enrolled in the ASAP is usually sufficient information. No lists of individuals from the unit who are enrolled in the ASAP will be maintained.

(6) Anyone seeking assistance through the ASAP prior to official enrollment is protected by the confidentiality requirements of the program. Information given to such inquiries will include a description of the local program including an explanation of the Limited Use Policy, confidentiality, and enrollment procedures. Military personnel must be officially enrolled by their commanders regardless of the source of referral. The ASAP will not provide rehabilitation counseling for anyone who is not enrolled in one of two program tracks. Nor will services be provided to anyone for whom accountability has not been established through the ASAP client reporting system.

10–17. Overview

a. Responding to an inquiry that concerns an abuser or former abuser of alcohol or other drugs is a complicated and sensitive matter. Requests for information may originate from a variety of sources and take a variety of forms. They may be direct (for example, from a parent) or through an intermediary (for example, a member of Congress inquiring for a parent). They may be received by written correspondence, by telephone, or during face-to-face conversation. Further, alcohol or other drug involvement may not surface until after an investigation has been initiated to provide information upon which to base a reply. The guidance contained in this section is intended to assist commanders or other officials receiving requests for information in preparing replies and complying with the policy contained in paragraphs 10–15 and 10–16 above; however it should not take the place of consulting with their servicing legal office

b. In all cases where disclosure is prohibited or is authorized only with the client's written consent, every effort should be made to avoid inadvertent disclosure. Even citing a referenced statute or this regulation as the authority for withholding information would identify the client as an abuser. Accordingly, replies to such inquiries should state that disclosure of the information needed to fully respond to the inquiry is prohibited by regulations and statutes. As appropriate, the reply may suggest that the inquirer contact the client directly. Where disclosure is permitted with the client's written consent, an interim reply may state that an attempt will be made to obtain the client's written consent.

c. The disclosure that an individual is not or has not been a client in the ASAP is fully as much subject to the prohibitions and conditions of the statutes and this regulation as a disclosure that such a person is or has been a client. Any improper or unauthorized request for disclosure of records or information subject to the provisions of this section should be addressed as specified in paragraph (2) above. Army policy is to neither confirm nor deny whether an individual has been a client in the ASAP.

d. Limitations on information. Any disclosure made under this section, with or without the client's consent, shall be limited to information necessary in light of the need or purpose for the disclosure.

e. Written statements. All disclosure shall be accompanied by written statement substantially as follows: "This information has been disclosed to you from records whose confidentiality is protected by Federal Law. Federal Regulations (42 CFR Part 2) prohibit you from making any farther disclosure of it without the specific written consent of the person to whom it pertains, or as otherwise permitted by such regulations. A general authorization for the release of medical or other information is NOT sufficient for this purpose." An oral disclosure, as well, should be accompanied or followed by such a notice.

f. Regulations governing release of information.

(1) To the extent that the contents of this section are in conflict with any other regulatory directives, the contents of this section will prevail.

(2) Disclosures authorized by this section are subject to further restrictions imposed by other regulatory directives pertaining to the release of information that are not in conflict with this section.

(3) This section does not prohibit release of information concerning the abuse of alcohol or other drugs from records other than those specified in paragraph 10–16. For example, a record of trial is not a record maintained in connection with alcohol or other drug abuse education, training, treatment rehabilitation, or research. If, in the judgment of the commander, disclosure of information not otherwise prohibited by this section would assist in providing an appropriate reply to an inquiry, the information may be released.

10–18. Disclosure to medical personnel or to rehabilitation programs

a. Disclosure to medical personnel, either private or governmental, to the extent necessary to meet a bona fide medical emergency, is authorized without the consent of the client. This includes emergency situations such as Family violence where there is spouse/child abuse of a potentially life threatening nature. If an oral disclosure is made under the authority of this paragraph, the CD will make a written memorandum for the record. This memorandum will be filed in the same manner as a written consent (see para 10–28 below). It will show the following:

(1) The client's name.

(2) The reason for the disclosure.

(3) The date and time the disclosure was made.

(4) The information disclosed.

(5) The name of the individual to whom it was disclosed.

b. In other than emergency situations, the written consent of the client is required (see 10–28 below). Such