



## Case Analysis Memorandum

### *Background*

The first purpose of military law is to promote justice; its ultimate purpose is to strengthen the national security. These objectives are sustained by a military justice system which is, at its core, a “truth-finding process consistent with constitutional law.” Fidelity to these means and ends turns on diligence in the investigation, development, analysis, and preparation of cases. The Case Analysis Memorandum (CAM) (formerly the Prosecutorial Merits Memorandum (PMM)), serves these objectives through two principal means: first, by ensuring competent preparation of a case in order to inform the advice of a Staff Judge Advocate (SJA) and thereby assist a commander in making an initial disposition decision under Rule for Courts-Martial (RCM) 306; and second, to enable supervision of counsel. The CAM also provides a historical record of case analysis for use by the SJA to the Commandant of the Marine Corps (CMC) in supervising the provision of legal services and command legal advice.

Merits memos have been standard practice for several years. This practice was first formalized as a requirement in Military Justice Branch Practice Advisory (PA) 1-16. That PA noted the work of a prior Marine Corps Judge Advocate Board (MCJAB), which had validated the requirement for PMMs. It also provided and encouraged—at that time as an option—the use of a reporting template in order to provide “a standardized method to document prosecution analysis.” The Merits memo issue was revisited by a subsequent MCJAB, with the primary purpose of determining a consistent standard for recommending whether or not a case should proceed to court-martial. Additionally, in the same MCJAB, the SJA to CMC approved changing the name of the PMM to CAM in order better to accommodate a broader set of considerations than the PMM alone could reflect, particularly changes made by the Military Justice Act of 2016. However, law and regulation has expanded various requirements and definitions to merits memos, the increasing complexity and administrative burden of interpreting and meeting those requirements.

### *Applicability and Authority*

This Practice Directive (PD) applies to government counsel (trial counsel and Staff Judge Advocates) and Victims’ Legal Counsel (VLC), and is issued pursuant to the authority of the SJA to CMC under Article 6, SECNAVINST 5430.27D, MCO 5430.2, and as Rules Counsel in the case of Marine judge advocates under JAGINST 5803.1E (Rules of Professional Conduct). This Directive implements interim guidance on case analysis pending development and issuance of additional Marine Corps policy in those portions of the Legal Services Administration Manual applicable to military justice and professional responsibility. This PD also cancels all prior Practice Advisories related to case memos, and supplements the provisions of the MCBUL 5800 applicable to case memos with the standards and definitions provided herein. All Marine judge advocates subject to the supervision of the SJA to CMC shall implement this Practice Directive in all cases currently under investigation or pending resolution, and in cases arising on and after the date of the Directive. Direct questions regarding the application of the Practice Directive to Judge Advocate Division (JM).

## *Discussion*

### *Federal Civilian and State Practice*

The standards applicable to both federal civilian and state criminal prosecutors take the view that the professional obligations associated with the exercise of prosecutorial discretion in determining whether to prosecute a case require consideration of more than the mere existence of probable cause. Both systems contemplate proceeding with a case only where the government possesses evidence it knows to be both admissible and likely to obtain and sustain a conviction at trial. To aid prosecutors in making these determinations, the federal civilian and state rule systems provide a framework, including extensive lists of factors to consider, in making these critical determinations.

The Department of Justice (DoJ) takes a detailed and conservative approach in analyzing its determinations on charging, disposition, and sentencing. Prosecutions conducted by the DoJ are governed by Title 9 of the U.S. Attorney's Manual (USAM), which contains several provisions applicable to initiating, declining, commencing, and disposing of cases, as well as properly documenting those decisions. The probable cause determination made by the United States Attorney is only the initial threshold for potentially taking several other courses of action. The DoJ approach leans conservatively toward charging not just on probable cause, but only those cases where there is admissible evidence and sufficient reason to believe a conviction can be obtained.

That conservative approach is mirrored in the practice of district attorneys at the state level. The National District Attorney Association (NDAA) employs a two-part framework to aid prosecutors first in determining whether to file charges, and second whether to commence trial. The NDAA framework also offers a list of factors to consider in exercising prosecutorial discretion as part of a broader screening function to “eliminate from the criminal justice system those cases where prosecution is not justified or not in the public interest.” Although the DoJ and NDAA systems employ slightly different criteria, both systems include careful consideration of whether the government will obtain a sustainable conviction at trial.

### *Military Practice*

While Article 34 of the UCMJ provides some guidance on the advice of an SJA to the convening authority, it does not specify the standard for a prosecutor in recommending whether or not to prosecute a case. For trial counsel involved in the case, the probable cause determination governs whether referral of charges and other forms of participation are proper under the Rules of Professional Responsibility. Rule 3.8 of the Rules of Professional Responsibility for Marine judge advocates requires a trial counsel in a criminal case, among other things, to “recommend to the convening authority that any charge or specification not supported by probable cause be withdrawn.” This rule closely parallels the American Bar Association Model Rule 3.8.

Trial counsel obligations notwithstanding, the Convening Authority is ultimately responsible for referral and referral decisions, and retains authority over the military justice process as a whole. As the discussion accompanying RCM 306(b) states, “the disposition decision is one of the most important and difficult decisions facing a commander.” That discussion section encourages consideration of several factors such as “the nature of the offenses, any mitigating or extenuating circumstances, the views of the victim as to disposition, any recommendations made by subordinate commanders, the interest of justice, military exigencies, and the effect of the decision on the accused and the command. The goal should be a disposition that is warranted, appropriate, and fair.”

### *The Military Justice Act of 2016 (Effective 1 January 2019)*

The Military Justice Act of 2016 (MJA) contains the most significant reforms to the UCMJ since the inception of the Code. A common trend found throughout the MJA is a closer alignment of the Code with its civilian counterparts. The MJA modifications to Article 34 also strengthen uniformity in the practice of military justice by

authorizing the President to prescribe guidance to be considered during the decision process on the disposition of potential charges. The Joint Service Committee has proposed for the president's signature a framework for that guidance in Appendix 2.1 that supplements the Manual for Courts-Martial (MCM). These factors are referred to as the "Non-Binding Disposition Guidance" (NBDG), and are designed to inform convening authorities, commanders, staff judge advocates, and judge advocates when exercising their duties with respect to the disposition of charges and specifications.

In determining whether the interests of justice and good order and discipline would be served by trial by court-martial or other disposition in a case, Appendix 2.1 counsels the commander or convening authority to consider, in consultation with a SJA or Judge Advocate, the following:

- a. The mission-related responsibilities of the command;
- b. Whether the offense occurred during wartime, combat, or contingency operations;
- c. The effect of the offense on the morale, health, safety, welfare, and good order and discipline of the command;
- d. The nature, seriousness, and circumstances of the offense and the accused's culpability in connection with the offense;
- e. In cases involving an individual who is a victim under Article 6b, the views of the victim as to disposition;
- f. The extent of the harm caused to any victim of the offense;
- g. The availability and willingness of the victim and other witnesses to testify;
- h. Admissible evidence will likely be sufficient to obtain and sustain a conviction in a trial by court-martial;
- i. Input, if any, from law enforcement agencies involved in or having an interest in the specific case;
- j. The truth-seeking function of trial by court-martial;
- k. The accused's willingness to cooperate in the investigation or prosecution of others;
- l. The accused's criminal history or history of misconduct, whether military or civilian, if any;
- m. The probable sentence or other consequences to the accused of a conviction; and
- n. The impact and appropriateness of alternative disposition options—including nonjudicial punishment or administrative action—with respect to the accused's potential for continued service and the responsibilities of the command with respect to justice and good order and discipline.

While the NBDG provide a useful framework for convening authorities in exercising their authorities and responsibilities, consideration and comment on each factor by trial counsel is unnecessary and may, in some cases, invade the province of the commander. While good judgment and careful analysis of the unique facts and circumstances of each individual cases will guide preparation of a CAM, the primary focus for trial counsel are factors regarding the availability of victims and witnesses, victim preferences regarding disposition, the admissibility of evidence and likelihood of obtaining a sustainable conviction, and criminal history of the accused—particularly in those cases where the government has reason to believe that prior misconduct is relevant and admissible in the present case.

The NBDG implements the MJA changes to Article 34. In substituting the standard for referral from "warranted by the evidence" to mere probable cause, the MJA arguably dilutes the threshold for proceeding in a given case. The MJA version of Article 34 provides that "the convening authority may not refer a specification under a charge to a general court-martial unless" the SJA advises the convening authority in writing that—

- (A) The specifications allege an offense;
- (B) There is probable cause to believe that the accused committed the offense charged; and
- (C) A court-martial would have jurisdiction over the accused and the offense.

However, the modifications to Article 34 make no changes to the duties of trial counsel carefully to analyze the merits of a case, and to communicate that analysis to the SJA in order to enable the disposition determination. This PD fills those gaps through establishing standards for Marine judge advocates in completing a CAM, including:

cases in which a CAM is required; who may draft and sign the memo; required contents and inputs; and the general level of detail and scrutiny accorded to memos based on the procedural posture and strength of a given case.

Finally, the input of victims as defined under Article 6b is not merely a legal requirement, but a significant factor for both counsel and commanders in analyzing and making a disposition determination in a case. Government counsel must consider the input of those victims, coordinate with VLC to obtain and include them in the analysis of a case, and include any written matters with the CAM when uploaded to CMS. Victims' Legal Counsel have a corresponding obligation to make those inputs available to government counsel within a reasonable time, as noted in this PD.

## ***Case Types, Content, and Form***

### ***When Required***

Cases requiring a CAM are generally among the more serious cases tried by courts-martial and have particular importance to pressing matters of justice, fair treatment, good order, and discipline. The disposition decision of a convening authority is not a decision to be taken lightly, particularly in a case in which admissible evidence demonstrates probable cause to believe the accused committed an offense and careful analysis of the evidence in such cases is essential. Accordingly, counsel shall prepare a CAM in all cases involving actual, attempted, or solicited offenses involving:

- Death;
- The infliction of grievous bodily harm; or
- Sex offenses under Articles 120, 120b, 120c, 125, 133, and 134.

The current patchwork of regulatory requirements is both simplified and synchronized with the policy objectives of case memos by requiring a CAM in a slightly broader class of cases, shifting focus from rigid procedural requirements to substantive analytical ones.

### ***Detail, Content, and Form***

The level of detail in a CAM will necessarily vary with case complexity, availability of witnesses, depth and strength of the evidence, and other legal issues. For example, a simple aggravated assault case involving grievous bodily harm might require significantly less exploration than a multiple victim sexual assault case involving detailed analysis of the admissibility of prior sexual conduct of victims or the accused. The determination of how much detail is appropriate is necessarily based on the specialized knowledge, training, and experience of the SVIP and RTC supervising the preparation of the CAM. The content of a CAM also varies with case complexity and type.

There are two types of CAMs: abbreviated and comprehensive. An abbreviated CAM enables analysis of the evidence and enhances tempo of prosecutions through swift application of established legal standards and requirements. A comprehensive CAM contains a full evidentiary analysis, often including assessments of witness credibility, the comparative strength of a case, and much greater detail in theories of admissibility of evidence and prosecutorial strategy.

The RTC, in consultation with the SJA, will determine whether to issue an abbreviated or comprehensive CAM. The RTC may delegate the authority to make this determination to an SVIP qualified STC. Any such delegation shall be in writing and shall specify the types of cases where the STC may act. The narrow discretion afforded to the RTC in determining the required detail in a CAM highlights the importance of the specialized knowledge, training, and experience of the SVIP, Senior Trial Counsel (STC), and RTC.

Counsel need only analyze the charges and specifications which make the CAM necessary in the first instance. Analysis of collateral or minor offenses such as underage drinking, adultery, fraternization, etc. is not required

(although also not prohibited). Where, for instance, collateral misconduct might form one or more bases on which the credibility of a witness may be attacked, counsel should strongly consider including analysis of the potential impact of that offense on the litigation. While analysis of collateral misconduct is not required in the CAM, the authority to dispose collateral misconduct in sexual assault cases remains with the Sexual Assault Initial Disposition Authority.

### ***Abbreviated CAM***

An abbreviated CAM is appropriate where, following preliminary review, the SVIP TC and RTC determine:

- There is no probable cause to believe the accused committed an offense.
- Although probable cause exists, an obvious and fatal flaw in the strength, availability, or admissibility of evidence or a critical witness renders the likelihood of obtaining a sustainable conviction at trial so remote that allocation of prosecutorial resources to the case is not in the interests of justice.
  - *Example:* Where an essential witness is unavailable, and there is no other means by which the government can prove its case, an Abbreviated CAM analyzing the availability of the key witness and the steps taken to contact that person would be proper.
  - *Example:* Where the evidence shows probable cause to believe that the accused committed the offense, but the only available evidence was obtained unlawfully and in a manner which will clearly result in its suppression, an abbreviated CAM analyzing only the admissibility issue would be proper.
- A victim who, having had the benefit of counsel (or who has affirmatively declined representation), clearly states an informed preference that the government not proceed with the case, and the interests of justice are served by advising the convening authority to dispose of the case without prosecution.
  - *Example:* Where a victim submits a signed victim's preference statement through VLC indicating a desire that proceedings not move forward, an abbreviated CAM that omits the analysis of the evidence but memorializes the victim's preference would be proper.
  - *Additional requirements:* The CAM will note the victim's preference in Block 1, and counsel must make appropriate entries in CMS to record that preference.
- Where there is probable cause to believe the accused committed an offense and the strength of the evidence supports trial by court-martial.
  - *Example:* Where an accused has confessed or made incriminating statements, the victim is cooperative, and the available evidence is strong enough to obtain a sustainable conviction at trial, an abbreviated CAM that omits the analysis of the evidence would be proper.

An Abbreviated CAM need not thoroughly analyze every element of each offense, but should clearly document the reasons for its recommendation, and identify the Appendix 2.1 factors on which that recommendation rests.

### ***Comprehensive CAM***

More complex cases require more comprehensive analysis. In general, counsel may generate a more comprehensive CAM in any case where, in the judgment of detailed counsel or the RTC, additional analysis is helpful or necessary. However, because the exercise of prosecutorial discretion is a matter within the purview of the convening authority, and because the decision not to proceed to preferral or referral in a case supported by probable cause and admissible evidence should be informed by thorough analysis and careful consideration of matters often outside the expertise of counsel in a case.

A comprehensive CAM will be prepared when, in the judgment of the RTC:

- There is probable cause to believe the accused committed an offense, there is no obviously fatal flaw in the available evidence or proof, but the preferral of charges is inadvisable based on one or more of the factors indicated in Appendix 2.1.

*Example:* Where a victim in a sexual assault case is available for trial and willing to proceed, but there are serious concerns with the credibility of a critical witness, the CAM must carefully analyze available evidence for strength and admissibility and carefully document that analysis. In these situations, a Comprehensive CAM that includes a full evidentiary analysis would be proper.

While a CAM is primarily an evaluation methodology for the current case, the CAM also serves as a lasting record of the prosecutorial analysis which enables the disposition determination of a convening authority. Therefore, the CAM should be thorough enough that someone unfamiliar with the case may observe the salient facts of a case and substantive legal issues analyzed in making a recommendation.

Regardless of the type of CAM or level of detail it contains, all CAMs will be completed and submitted on the form provided by Judge Advocate Division. Completion of the fields in Block 1 is mandatory, as is the entry of Block 1 data in the Case Management System.

### ***Procedure, Personnel, and Timelines***

Completion and signature of the CAM is ultimately the responsibility of the RTC. However, case analysis, CAM preparation, and coherent recommendation on disposition of a case are not possible in the absence of a substantially complete report of investigation, whether from a law enforcement agency or from command sources. Accordingly, counsel may return a Request for Legal Services (RLS) to an originating command when the RLS is not accompanied by a substantially complete investigation which will, in the judgment of counsel signing the CAM, enable diligent and professional analysis of the case.

An investigation is “substantially complete” when the NCIS Supervisory Special Agent has approved a case status of “pending adjudication.” In the discretion of the RTC, the CAM may be completed before the receipt of a “substantially complete investigation.” In such cases, the cosigner should note the reasons in the supervisory attorney comments section of block 7 on the CAM form.

#### ***Procedure***

On receipt of an RLS, the Special Victim Investigation and Prosecution qualified Trial Counsel (SVIP TC) and RTC will assign the case for preliminary review. Junior counsel not yet certified as an SVIP TC may participate in the preliminary review and preparation of a CAM under the supervision of an SVIP TC. In addition, the input of a Litigation Attorney Advisor (LAA), formerly the Highly Qualified Expert, may be extraordinarily valuable in many cases, particularly in complex litigation. While the determination of whether a CAM would benefit from further review by the LAA is a matter within the discretion of the RTC, the LAA is only required to provide input on comprehensive CAMs.

In addition to the government counsel providing analysis of evidence and prosecutorial merit of a case, recommendations, and command legal advice, VLC play a critical role in ensuring just results by advising their clients and effectively communicating the inputs of those clients in order to enable the disposition determination of a convening authority. Accordingly, VLC will provide those inputs in writing in accordance with this PD.

## *Personnel*

Some memoranda must be signed by counsel with certain qualifications.

- Only an SVIP TC or RTC may sign an Abbreviated CAM. The RTC may delegate authority to sign an abbreviated CAM to an SVIP qualified STC. Any employment of this delegation must be noted in the supervisory attorney comments section of the CAM.
- Both the SVIP TC *and* RTC must sign a Comprehensive CAM.
- Any judge advocate may sign a CAM in a case where no CAM is required but, in the judgment of the RTC, a memo will contribute materially to the proper disposition of that case. Use of the CAM to resolve issues in cases where a CAM is not formally required is encouraged.
- The LAA is not required to sign any CAM.

## *Timelines*

- The preliminary review of a case will be completed within 30 days of receipt of an RLS accompanied by a substantially complete investigation.
- Where a victim under Article 6b desires to submit matters for consideration, the VLC will submit those matters in writing within 10 days of a request for those matters by government counsel.
- Counsel will complete, sign, and forward to the SJA an Abbreviated CAM within 15 days of completing a preliminary review.
- Counsel will complete, sign, and forward to the SJA a Comprehensive CAM should be completed within 60 days of receipt of an RLS accompanied by a substantially complete investigation.
- The CAM must be uploaded into the Case Management System (CMS) within 5 working days of completion.

## *Confidentiality*

By its nature and purpose, a CAM will nearly always contain significant judgments about the proper means of prosecuting a case, and the assessment of government attorneys regarding the best means of doing so. Because the attorney client privilege and work product doctrine are both well-established in military and civilian rule and jurisprudence, counsel will diligently safeguard the CAM from disclosure. This includes refraining from placing in the CAM any matters which might render the document discoverable and, in the case of the SJA, reserving the CAM from matters forwarded to the convening authority for consideration. While that determination is ultimately made by the military judge, it is the duty of government counsel to ensure the confidentiality of the CAM to the maximum extent permissible under the law.

## *Conclusion*

Thorough analysis and assessment of a case is a fundamental duty of government counsel. The CAM is a critical tool for trial counsel, Senior Trial Counsel, Regional Trial Counsel, SJAs, and the SJA to the CMC. Standardizing the use of and practice surrounding CAMs across the Marine Corps legal community the SJA to the CMC ensures a more uniform standard of practice, facilitates sound legal advice to convening authorities, and promotes justice. Direct any questions about this Practice Directive to the JMJ Branch Head at (703) 693-9003, or TCAP at (571) 256-4716.