

To: Representative Assembly

From: Nathan A. Triplett, Director of Governmental Relations

Date: August 14, 2026

Re: Proposed Amendment of MCL 769.34(4)(a) – Intermediate Sanctions

Background

The proposal submitted to the Representative Assembly recommends that the State Bar of Michigan support legislation to amend MCL 769.34(4)(a) by striking the “shall impose” presumption of an intermediate sanction for defendants with an upper sentencing guideline limit of 18 months or less and replacing it with discretionary “may impose” language. It also proposes requiring the sentencing judge to consider “the seriousness of the offense, the offender’s prior record, victim impact, and the need for public protection” when determining whether to impose an intermediate sanction. The State Bar of Michigan has considerable history with legislation concerning sentencing guidelines and presumptions, including with Section 34(4)(a) specifically.

The statutory language now codified as MCL 769.34(4)(a) was first added to the Code of Criminal Procedure, 1927 PA 175, in 1994 by House Bill 4782, which became 1994 PA 445 when signed into law. Public Act 445 created the Sentencing Commission and charged it with developing sentencing guidelines within certain parameters, including provisions related to the imposition of intermediate sanctions. Specifically, PA 445 provided that, if the upper limit of the minimum sentence for a defendant convicted for a felony is 18 months or less, “the court shall impose an intermediate sanction unless the court states on the record a substantial and compelling reason to sentence the individual to the jurisdiction of the department of corrections.” The definition of “intermediate sanction” adopted as part of PA 445 included, among other things, jail and probation with jail. The State Bar of Michigan supported HB 4782.

Subsequently, the guidelines developed by the Sentencing Commission were enacted into law by 1998 PA 317 (1997 HB 5419). That legislation also amended MCL 769.34(4)(a) to add: “An intermediate sanction may include a jail term that does not exceed the upper limit of the recommended minimum sentence range or 12 months, whichever is less.” The State Bar of Michigan supported HB 5419.

In April 2019, Governor Whitmer signed Executive Order 2019-10 establishing the Michigan Joint Task Force on Jail and Pretrial Incarceration (“Task Force”) with the charge of “developing ambitious, innovative, and thorough recommendations for changes in state law, policy, and appropriations to expand alternatives to jail, safely reduce jail admissions and length of stay, and improve the efficiency and effectiveness of Michigan’s justice systems.” The Task Force issued its report and recommendations in January 2020. The report concluded that “Michigan law provides no guidance on when probation or another jail alternative should be the preferred or presumed sentence” and that “Michigan’s felony sentencing guidelines . . . designate categories of cases in which ‘intermediate sanctions’ are appropriate, but defines the term broadly to mean jail, probation, or a combination of the two.” To remedy this situation, the Task Force adopted Recommendation 14: “Reduce the number of people sentenced with jail time for certain felonies” and, specifically, “[establish] a rebuttable

presumption that people recommended for an ‘intermediate sanction’ by the sentencing guidelines receive a probation sentence with no jail term included.”

In 2020, a package of bills was introduced to implement several of the recommendations made by the Task Force, including those related to intermediate sanctions. SB 1048 amended MCL 769.34(4)(a). It retained the “shall impose an intermediate sanction” language, which was added in 1994 and has remained unchanged in the intervening 32 years. As in the past, the bill retained a means for the sentencing judge to deviate from this presumption. From 1994-2020, Section 34(4)(a) required that the court state on the record “a substantial and compelling reason” to sentence the individual to incarceration. SB 1048 requires only that the court state “reasonable grounds” on the record for the judge to sentence the individual to incarceration in a county jail for not more than 12 months or to the jurisdiction of the Michigan Department of Corrections for any sentence over 12 months. The bill struck the language added in 1998 that included jail sentences that do not exceed the upper limit of the recommended sentence range or 12 months, whichever is less, as an intermediate sanction. It also removed jail, probation with jail, jail with work or school release, and jail with or without authorization for day parole from the definition of “intermediate sanction.”

In addition to the Joint Task Force on Jail and Pretrial Incarceration, SB 1048 was supported by Safe & Just Michigan, Criminal Defense Attorneys of Michigan, ACLU of Michigan, Michigan Catholic Conference, League of Women Voters, Americans for Prosperity, and Michigan Coalition to End Domestic & Sexual Violence. Due to reduced public policy activity undertaken during the COVID-19 pandemic, the State Bar of Michigan did not review or take a position on the legislation. It was approved by the Legislature with broad, bipartisan support (36-1 in the Senate and 92-13 in the House) and signed into law by the Governor in January 2021.

The proposal submitted to the Representative Assembly was reviewed by three State Bar standing committees: Access to Justice Policy, Criminal Jurisprudence & Practice, and Justice Initiatives. All three voted to oppose the proposal.

***Keller* Considerations**

The State Bar of Michigan has previously adopted public policy positions on legislation pertaining to MCL 769.34(4)(a) twice before: 1994 HB 4782 and 1997 HB 5419. In both instances, SBM supported the legislation (as detailed above). Both were considered prior to the implementation of SBM’s current *Keller* review process.

Since the adoption of the current *Keller* review process, SBM has determined that several pieces of legislation related to the general structure of sentencing in Michigan (as opposed to the appropriate sentence for any discrete criminal offense) were reasonably related to the functioning of the courts and therefore *Keller*-permissible. For example, and similar to the two aforementioned pieces of legislation that dealt with the Sentencing Commission, SBM determined that legislation (2014 HB 5928) creating the Criminal Justice Policy Commission, which was charged with conducting research and analysis related to sentencing and making research-based recommendations regarding state sentencing policy, was reasonably related to the functioning of courts and therefore *Keller*-permissible. SBM supported this bill. SBM also reached the same *Keller* conclusion when considering legislation (2023 HB 4173 and 2023 HB 4384) to reestablish a Michigan Sentencing Commission last legislative session. SBM supported this bill as well. Throughout these deliberations, the State Bar of Michigan has argued that sentencing guidelines and presumptions provide parameters for the exercise of judicial discretion and have a significant impact on the manner in which

cases proceed through the criminal legal system. They are therefore germane to the *Keller*-permissible purpose of improving the functioning of the courts.

In a related vein, in the current legislative session, SBM determined that thirteen bills (2026 HB 5907-5918 and 2026 HB 5831) were, to the extent that each imposed a mandatory minimum sentence, reasonably related to court functioning and therefore *Keller*-permissible. SBM opposed these bills. In doing so, the Bar remained consistent with prior public policy positions dating back to at least 2005. At that time, SBM determined that 2005 HB 4163, which would have imposed a mandatory minimum sentence for offenses related to fleeing and eluding a police or conservation officer, was *Keller*-permissible and opposed it.

Because MCL 769.34(4)(a) addresses the presumption of intermediate sanctions for a class of criminal offenses, it involves the same sort of general sentencing parameters and implicates the same questions regarding the proper scope of judicial discretion, as legislation the State Bar has historically and consistently determined to be reasonably related to court functioning and therefore *Keller*-permissible.

***Keller* Quick Guide**

THE TWO PERMISSIBLE SUBJECT-AREAS UNDER KELLER:

As interpreted by AO 2004-1	Regulation of Legal Profession	Improvement in Quality of Legal Services
	Regulation and discipline of attorneys	✓ Improvement in functioning of the courts
	Ethics	Availability of legal services to society
	Lawyer competency	
	Integrity of the Legal Profession	
	Regulation of attorney trust accounts	

Staff Recommendation

The proposal to amend MCL 769.34(4)(a) is reasonably related to the functioning of the courts and therefore *Keller*-permissible. It may be considered on its merits.

**PROPOSAL TO THE STATE BAR OF MICHIGAN REPRESENTATIVE
ASSEMBLY REGARDING REVIEW AND PROPOSED AMENDMENT OF MCL
769.34(4)(a)**

Issue

Should the Representative Assembly adopt a resolution urging the State Bar of Michigan to undertake a formal review of MCL 769.34(4)(a), and to recommend that the Michigan Legislature amend that statute to restore sentencing discretion to circuit court judges when the upper limit of the recommended minimum sentence range is 18 months or less, including by eliminating or modifying the mandatory presumption of intermediate sanctions and creating appropriate statutory exceptions?

Current statutory language (excerpt):

“If the upper limit of the recommended minimum sentence range for a defendant determined under the sentencing guidelines set forth in chapter XVII is 18 months or less, the court ~~shall impose an intermediate sanction~~ unless the court states on the record reasonable grounds to sentence the individual to incarceration...”

Proposed Amendment:

“If the upper limit of the recommended minimum sentence range for a defendant determined under the sentencing guidelines set forth in chapter XVII is 18 months or less, the court **may impose an intermediate sanction in its discretion, after considering the seriousness of the offense, the offender’s prior record, victim impact, and the need for public protection,** unless the court states on the record reasonable grounds to sentence the individual to incarceration...”

Proponent

Lawrence R. LaSusa, Representative, 13th Judicial Circuit
State Bar of Michigan Representative Assembly
LaSusa Law Offices, PLC
Traverse City, Michigan
(231) 392-9616
llasusa@lasusalaw.com

Synopsis

In 2021, the Michigan Legislature amended MCL 769.34 to require that when the upper limit of a defendant’s recommended minimum sentence range is 18 months or less, the sentencing court must impose an “intermediate sanction,” effectively creating a presumption of probation and no incarceration. Members of the 13th Circuit Court bench and bar have identified serious and unintended consequences resulting from this statutory mandate. The amendment has created inappropriate outcomes in certain serious cases and has removed necessary judicial discretion in felony sentencing matters. This proposal urges legislative review and amendment to restore discretion and provide appropriate statutory exceptions.

Background

MCL 769.34(4)(a) currently mandates that when the upper limit of the sentencing guidelines is 18 months or less, the court shall impose an intermediate sanction unless it articulates reasonable grounds for incarceration. In practical effect, the statute creates a presumption against incarceration for a wide range of felony offenses.

Trial judges have documented cases involving sexual offenses against minors, repeat OWI offenders, and substantial financial crimes where guideline ranges such as 0–9, 0–11, or 0–17 months triggered the statutory presumption of intermediate sanctions despite serious factual circumstances.

While judges retain authority to depart from the presumption, the statutory structure reverses the traditional sentencing framework by requiring justification for incarceration rather than permitting judicial discretion in the first instance. The statute also lacks categorical exceptions for repeat drunk driving offenses, assaultive crimes, or sexual offenses.

Sentencing guidelines promote statewide uniformity; however, the 2021 amendments arguably constrain proportional sentencing discretion in cases where public safety, victim impact, and offender history warrant incarceration.

Opposition

No formal opposition is known at this time. Potential concerns may include the promotion of sentencing uniformity and reduction of incarceration rates. This proposal does not advocate eliminating sentencing guidelines but seeks to restore judicial discretion and introduce reasonable statutory exceptions.

Prior Action by Representative Assembly

None known regarding MCL 769.34(4)(a) since the 2021 amendments.

Fiscal and Staffing Impact on State Bar of Michigan

Minimal. This proposal requests policy review and potential advocacy. Any fiscal impact would be limited to internal review and communication efforts.

STATE BAR OF MICHIGAN POSITION

By vote of the Representative Assembly on April 25, 2026

Should the Representative Assembly adopt a resolution urging legislative review and amendment of MCL 769.34(4)(a) to restore judicial sentencing discretion when the upper limit of the recommended minimum sentence range is 18 months or less?

Yes

or

No