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To: Members of Senate Judicial Proceedings Committee

From: MSBA Estate & Trust Law Section

Date: January 23, 2025

Subject: **SB 135** – Estates and Trusts – Fiduciaries – Attorney-Client Privilege

Position: Support

The Estate and Trust Law Section of the Maryland State Bar Association (MSBA) **supports Senate Bill 135– Estates and Trusts – Fiduciaries – Attorney-Client Privilege**. Senate Bill 135 creates certainty in the law by codifying the attorney-client privilege in fiduciary situations.

Problem with Current Law

The attorney-client privilege, codified at Maryland Code Ann. Cts. & Jud. Pro. § 9-108, is an established, sacrosanct privilege that allows clients to communicate openly with their attorneys without fear that their communications can be discovered and used against them.¹ However, there is uncertainty whether the attorney-client privilege applies to a fiduciary (such as a trustee, agent under a financial power of attorney, or a personal representative) who seeks legal advice and counsel. Maryland law does have some limited exceptions to the attorney-client privilege; however, a fiduciary exception is not one of them. *See Trasatti v. Trasatti*, 2018 Md. App. LEXIS 546 (explaining that Maryland has never recognized a fiduciary exception to the attorney client-privilege) (unreported opinion). A minority of jurisdictions have taken the position that legal advice that a fiduciary receives related to the administration of the estate benefits the beneficiaries and therefore is not privileged. Maryland Courts have not provided a clear standard to address this uncertainty, which leads to increased costs and delayed adjudication when the issue is raised in fiduciary litigation.

How SB 135 Solves the Problem

Senate Bill 135 resolves this uncertainty by affirmatively codifying the application of the attorney-client privilege to fiduciary engagements. This, in turn, allows fiduciaries to be candid

¹ Maryland has adopted the following definition of the attorney-client privilege: (1) Where legal advice of any kind is sought, (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence, (5) by the client, (6) are at his insistence permanently protected, (7) from disclosure by himself or by the legal adviser, (8) except the protection may be waived. *Newman v. State*, 384 Md. 285, 302 (Md. 2004) (citing *Harrison v. State*, 276 Md. 122, 135 (1975)).

and thorough when discussing legal issues with their attorney, as any other client would in any other scenario. Explicitly codifying that Maryland does not recognize a fiduciary exception to the attorney-client privilege will resolve any uncertainty and avoid wasteful litigation relating to this issue.

For the reasons stated above, the Estate and Trust Law Section of the MSBA **supports SB 135 and urges a favorable committee report.**

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