

**SB135 FAV.pdf**

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Position: FAV

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THE SENATE OF MARYLAND  
ANNAPOLIS, MARYLAND 21401

January 23, 2025

The Maryland State Senate Judicial Proceedings Committee  
The Honorable William C. Smith, Jr.  
2 East Miller Senate Building  
Annapolis, Maryland 21401

**Re: Senate Bill 135: *Estates and Trusts – Fiduciaries – Attorney-Client Privilege***

Dear Chairman Smith and Members of the Committee,

Maryland defines attorney-client privilege as: (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) which are 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)).

Maryland recognizes some limited exceptions to attorney-client privilege; however, a fiduciary exception to attorney-client privilege is not among them. See *Trasatti v. Trasatti*, 2018 Md. App. LEXIS 546. The fiduciary exception to the attorney-client privilege, which is recognized in a minority of states, allows the beneficiaries of a trust or estate to discover communications between the fiduciary and counsel generated while administering the trust or estate. The result is a breakdown in the attorney-client relationship.

Maryland case law and statutes do not clearly state that Maryland does not recognize the fiduciary exception to the attorney-client privilege. As a result, parties often raise the issue in litigation, resulting in increased cost and delayed adjudication of the matter.

This bill will add a section to the Estates and Trusts Code that makes clear, like many other states, that Maryland does not recognize the fiduciary exception to the attorney-client privilege

I appreciate the Committee's consideration of Senate Bill 135 and will be happy to answer any questions the Committee may have.

# **SB135 Witness Support.pdf**

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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

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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.<sup>1</sup> 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

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<sup>1</sup> 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.**

**For further information, please contact:**

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