

# Responsibilities Of Instrumental Witnesses In The Preparation Of Notarial Deeds Containing Defects

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## Abstract.

*A notary deed serves as an authentic piece of evidence in a legal relationship, which requires the presence of not only a notary but also an instrumental witness. The existence of instrumental witnesses is a condition for the validity of a deed, because a deed without instrumental witnesses will lose its authenticity. However, when a deed contains formal or material defects, questions arise as to the extent of the responsibility imposed on the witnesses. This study uses normative legal research methods with a statutory approach, examining the Law on Notary Positions (UUJN), the Civil Code, and relevant doctrines. This study aims to analyze the legal responsibility of instrumental witnesses in making notary deeds containing defects. This research is a normative legal research with a legislative approach. The analysis was carried out using the theory of legal responsibility and the theory of legal protection as the basis for argument. The results of the study show that the responsibilities of instrumental witnesses should be limited to formal aspects, such as attendance and deed signing. Therefore, a renewal of the notarial law is needed that explicitly regulates the limits of responsibility.*

**Keywords:** Defective Deed; Notary Deed; Legal Protection; Instrumental Witnesses and Legal Responsibility.

## I. INTRODUCTION

The State of the Republic of Indonesia is a State of Law as stipulated in Article 1 paragraph (3) of the 1945 Constitution, where power is subject to the Law. Law is the protection of human interests. The law regulates all relationships between individuals and individuals with groups or communities as well as individuals with the government. The principle of the state of law guarantees certainty, order, and legal protection which contains Truth and Justice, Certainty, Order and Legal Protection requires, among others, that traffic in people's lives requires evidence that clearly determines the rights and obligations of a person as a subject of law in society. A legal professional is required to be a person who is completely trustworthy and does not take advantage of circumstances improperly. The legal profession must be carried out by upholding dignity, accompanied by the use of all knowledge and skills possessed. This is because the duties of the legal profession have a social dimension that is closely related to fundamental values that reflect human dignity. Therefore, the practice of the legal profession requires supervision from the public. (Lubis, 2014) Law Number 30 of 2004 concerning the Office of Notary which has been amended by Law Number 2 of 2014 (hereinafter referred to as UUJN) in Article 1 Paragraph (1) states that Notaries are public officials who are authorized to make authentic deeds and have other authorities as stipulated in this law and other laws and regulations. Notaries, one of the legal professionals in Indonesia, have functions and roles in the national development movement which is increasingly complex today, especially in the field of law. In exercising the authority to make this authentic deed, the Notary must be obliged to fulfill his oath of office. The oath of office gives the notary the obligation and the right to keep secret about all the work that is notified and entrusted to him.

If when making the deed does not meet the provisions of the Notary Position Law, then when making the deed there is a party who feels aggrieved can ask for compensation from the Notary. (Eudea Adeli Arsy, 2021) In the process of making a deed, the notary is required to present more than one witness, whose identity must be clearly stated in the deed as stipulated in Article 40 of the Law on the Notary Position. The provisions regarding the requirements for the witness are expressly stipulated and the witness concerned must be known by a notary. In notary practice, this witness is known as an identifier/witness and

an instrumental witness. Witnesses appointed by notaries can basically come from anyone, as long as they meet the provisions stipulated in the UUJN. However, in practice, instrumental witnesses are generally employees or staff of the notary concerned. The presence of witnesses in the making of the deed has an absolute and binding role. If there are problems or disputes related to the deed made by the notary, then the responsibility is not only imposed on the notary alone. Instrumental witnesses listed in the deed can also be asked to provide information as witnesses related to the deed that he has signed. (Fakta Andony, 2020) The role of instrumental witnesses is to affix signatures to the deed, give testimony about the truth of the contents of the deed, and ensure the fulfillment of formalities as required by law. In practice, instrumental witnesses generally come from the notary employee himself because of the close relationship with the notary concerned.

The consequence of the inclusion of the witness's signature is that the witnesses are directly considered to have an important role in making the deed and understand the entire content of the deed. However, in practice, the role of an instrumental witness is often only a formality. Many notary offices ignore the function of instrumental witnesses, for example in the reading of deeds in front of the witnesses, instrumental witnesses are not always present. In fact, often the signatures and initials of witnesses are only affixed when the notary's office will undergo an annual examination by the notary supervisory body. This condition shows that the instrumental witness does not in fact fully understand the role and responsibility attached to him. (Hanna Nathasya, 2016) In practice, when a notary deed becomes the object of a lawsuit or report, investigators from both the police and the prosecutor's office will first call instrumental witnesses to be questioned about the deed in question. This is because there is a provision that if a notary is summoned by an investigator regarding the deed he made, he is obliged to report first to the Regional Notary Honorary Council (MKNW). Thus, the decision on whether or not a notary is present in the investigator's summons depends on the outcome of the MKNW's decision. If the MKNW decides that the notary does not need to comply with the summons because the deed is considered to be in accordance with procedure, then the investigator will continue to look for ways to dig deeper information into instrumental witnesses. This raises questions about how the accountability of instrumental witnesses in making the deed

## II. METHODS

The type of research used in this study is normative legal research. According to Peter Mahmud Marzuki in his book *Legal Research*, normative legal research is a method to find rules, principles, and legal doctrines that can be used in answering legal problems under investigation. The approach in this study uses a legal approach (*statute approach*). Legal approach (*statute approach*) is carried out by examining laws and regulations that are sufficiently capable of accommodating existing legal problems. Normative law research is carried out by examining normative legal cases in the form of legal behavioral products. The main focus is on laws that are understood as norms or rules that apply in society and become a guideline for the behavior of each individual. Therefore, normative legal research focuses on positive legal inventory activities, the study of legal principles and doctrines, and the discovery of law in cases *in concrete terms*, the preparation of legal systematics, analysis of the level of legal synchronization, legal comparison, and the study of legal history. (Marzuki P. M., 2014).

The research materials used in this study consist of primary data, namely the 1945 Constitution of the Republic of Indonesia, the Civil Code, Law Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning the Notary Position, and Law Number 31 of 2014 concerning Amendments to Law Number 13 of 2006 concerning the Protection of Witnesses and Victims and secondary data which includes scientific works and research results that relevant, such as theses, dissertations, and legal journals. In addition, legal dictionaries and other literature related to the problems being researched are also used (Marzuki P. M., 2014). The technique of collecting legal materials in this study is carried out through literature studies or document studies (*library research*). Literature study is a method of data collection by examining various written sources, such as laws and regulations, books, archives, and other documents relevant to the research topic. In addition, it also includes materials from mass media such as newspapers, the internet, as well as opinions, theories, and doctrines related to the problems being researched (Marzuki P. M.,

2014). The analysis technique used in this study is a syllogism method with a deductive mindset, which is based on general principles that are then applied to the research object to obtain conclusions on specific facts.

### III. RESULT AND DISCUSSION

#### **Responsibilities Of Instrumental Witnesses In The Preparation Of Notarial Deeds Containing Defects**

The Notary Deed was born on the basis of the will of the parties who are facing the notary. Without the desire of the parties to pour out their agreement in the form of a deed, the agreement before a notary cannot be implemented. In carrying out his position, the notary is obliged to pour the will of the parties into the deed in accordance with the provisions of the applicable law so as not to cause legal defects and to maintain the status of an authentic deed. (Adjie, 2009) The substance of the Notary Deed is the embodiment of the will of the presenters, not the will of the notary. In this case, the notary plays a neutral, impartial role, and is obliged to correct if there are things that are wrong or should not be stated in the deed. In the practice of notary, notaries are also obliged to provide understanding to the parties about the content of the deed made, as well as read it in front of them. An authentic deed made by a notary has a function as perfect evidence, namely every substance listed in it is considered correct by the judge as long as there is no party to the problem. If the Notary deed made by the interested parties is considered not to fully reflect their wishes, then the parties by mutual agreement can return to the Notary to make a deed of amendment or deed of cancellation of the deed previously made. In the practice of notary law, if the Notary deed is disputed by interested parties, they are obliged to appear before the Notary again to make a deed of cancellation. With the existence of the deed of cancellation, the parties are no longer legally bound by the previous agreement, and all legal consequences of the cancellation are the responsibility of the parties concerned.

In the Indonesian legal system, witnesses are one of the legitimate evidence. In the context of Civil Procedure Law, a witness is defined as someone who provides information, either orally, in writing, or through signatures, about what he witnesses. This information can be in the form of other people's actions or actions, or circumstances arising from an event. In each deed, the notary is required to present more than one witness, whose identity must be clearly stated in the deed in accordance with the provisions of Article 40 of the Notary Position Law. In the preparation of a Notary Deed, the existence of instrumental witnesses is a formal provision that cannot be ignored because it determines the authenticity of the deed. This provision has been clearly regulated in Article 1868 of the Civil Code and Article 40 of Law Number 2 of 2014 which amends Law Number 30 of 2004 concerning the Position of Notary. A Notary Deed is referred to as a complete Notary Deed if all formal conditions are met, so that the Notary Deed has perfect evidentiary power, and the position of instrumental witness which is one of the formal requirements in a Notary Deed can be legally accounted for. (I Komang Sujanayasa, 2016) Instrumental witnesses are witnesses who are present at the time the deed is made, then affix their signatures as a form of their presence, as well as provide information about the fulfillment of the formalities required by law. The information was stated in the deed and directly witnessed by the instrumental witness. (Hatta Isnaini Wahyu Utomo, 2019) Instrumental witnesses also play a role from the initial stage of making the deed, including the collection of supporting data, the payment of fees related to the deed, to the process of typing, reading, and signing the deed. However, this involvement does not necessarily make the instrumental witness responsible for all legal consequences arising from the deed.

This is because the function of an instrumental witness is solely to witness and ensure that the Notary has carried out the formalities in making the deed. (Dhaniaty, 2019) The responsibility of the instrumental witness is in principle related to the formal technical aspects of making the deed. In terms of typing and drafting of the deed, the Notary employee who functions as an instrumental witness is responsible for ensuring that the typing results are in accordance with the specified draft. In addition, instrumental witnesses also have the responsibility to match the identities of the witnesses, so that the names and data listed in the deed are completely the same as the identities of the parties present in the making of the deed. However, all of these responsibilities are inseparable from the direction and instructions of the Notary, considering that the Notary remains the main party who has the authority and authority in ensuring the

validity of the deed.(I Komang Sujanayasa, 2016) Instrumental witnesses are basically only responsible for the tasks assigned or ordered by the Notary. If a Notary employee is assigned to be a witness in the inauguration of a deed, he is obliged to be present to witness the inauguration, which includes the reading of the deed by the Notary and the signing by the witnesses, the Notary, and witnesses. Thus, Notary employees who act as instrumental witnesses do not bear responsibility for the substance or content of the deed they sign.This is based on the nature of his position solely as an employee assigned by a Notary, with responsibility limited to the technical aspects of the preparation and formalities of making the deed. Instrumental witnesses, who are generally Notary employees, only play the role of a party presented to meet the formal requirements for making a deed, so they do not have responsibility for the substance of the deed.

Full responsibility for the content of the deed remains with the Notary, even though the existence of a witness is a valid condition for the deed as stipulated in Article 40 of Law Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning the Notary Position. Thus, the role of instrumental witnesses is limited to witnessing the inauguration of the deed, including the reading and signing process.If a deed turns out to contain defects that result in a decrease in the evidentiary power of the deed from an authentic deed to a deed under hand, then the full responsibility is imposed on the Notary. This is in line with the provisions in the Law on the Notary Position which states that the degradation of the evidentiary value of a deed is caused by a violation or non-fulfillment of formal requirements as determined by law, so that it cannot be charged to instrumental witnesses.(Pomantow, 2018) A Notary Deed that has a formal defect can result in the deed being downgraded from an authentic deed to a deed under hand. This is in accordance with the provisions of Article 1868 of the Civil Code (KUHPercivil) which states that "*an authentic deed is a deed made in the form prescribed by law by or in the presence of a public official authorized for it at the place where the deed is made.*" Furthermore, Article 1869 of the Civil Code emphasizes that "*a deed that cannot be enforced as an authentic deed, either because of the incompetence or incompetence of the public official concerned or because of a defect in its form, has the force of writing under the hand when signed by the parties.*"In addition, the regulation regarding the decrease in the evidentiary power of Notary deeds is also affirmed in Law Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning the Notary Position.

However, the determination that a Notary deed is degraded into a deed under hand cannot be done unilaterally by the witnesses, by the Notary, or by other parties. The validity of the degradation must still be determined through a court decision based on the lawsuit filed against the deed in question, as stipulated in Article 1869 of the Civil Code. Thus, only the court has the authority to cancel or lower the evidentiary value of a Notary deed, for juridical reasons that are generally identical to the reasons for the cancellation of an agreement.Notaries as public officials bear full responsibility for the authentic deed they make. If the deed is then degraded to its evidentiary power to become a deed under hand or even null and void for the sake of the law, then the party who feels aggrieved has the right to file a claim for compensation to the Notary. However, this responsibility can only be imposed as long as the defect or error in the deed indeed stems from the negligence of the Notary.According to Hans Kelsen, legal liability can be divided into four forms, namely: (1) *absolute liability* or responsibility regardless of whether there is or is not an error; (2) *culpability* or responsibility due to fault or negligence; (3) the collective responsibility imposed on the group; and (4) individual responsibilities imposed on an individual.If associated with this theory, then instrumental witnesses cannot be held accountable for defects or errors in the deed, because their position is only limited to employees assigned by the Notary to prepare the deed and witness the inauguration process through the reading and signing of the deed. Thus, the instrumental witness is not responsible for the content of the deed, because he does not have substantial authority in its creation.Therefore, legal liability for deed defects is fully the responsibility of the Notary as a public official, while instrumental witnesses only carry out administrative duties according to the Notary's orders.

#### IV. CONCLUSION

Notary employees appointed as instrumental witnesses do not bear responsibility for the substance or content of the deed. If a Notary Deed contains a formal defect that results in a decrease in the power of proof

to become a deed under hand, or there is a material defect that results in the cancellation of the deed, either cancelable or void for the sake of law, it is not the responsibility of the Notary employee as an instrumental witness in the deed.

## REFERENCES

- [1] Adjie, H. (2009). *Civil Sanctions and Notary Administration as Public Officials*. Bandung: Refika Aditama.
- [2] Ashofa, B. (2010). *Legal Research Methods*. Title: A Variety of Creations.
- [3] Bintang, S. (1998). *Copyright Law*. Bandung: Citra Aditya Bakti.
- [4] Damain, E. (1999). *Copyright law according to several international conventions. Copyright Act 1997 and its Protection of Books and Publishing Agreements*. Bangalore: P.T Alumni.
- [5] Dhaniaty, M. (2019). The position of the instrumental witness on the Notary Deed which raises problems in civil cases. ***Journal of Legal and Judicial Media***, p. Sec. 123.
- [6] Eric M. Dobrusin, R. A. (2012). *Intellectual Property Culture : Strategies to Foster Successful Patent and Trade Secret Practices In Every Business*. Oxford University Press.
- [7] Eudea Adeli Arsy, H. N. (2021). The responsibility of the notary for deeds that are legally defective and not in accordance with the provisions for making deeds in the Law on the Notary Position. ***Journal of Bina Mulia Hukum***, 6.1, 132.
- [8] Andony, A. A. (2020). The position of notary employees as witnesses in authentic deeds in the investigation and judicial process is reviewed by the Law on the Notary Position. ***Journal of Civil Procedure Law ADHPER***, 83.
- [9] Hanna Nathasya, R. H. (2016). The Position of Instrumental Witnesses in the Making of Notary Deeds in National Law. ***Unimed Journal***, 8.2, 14.
- [10] Hatta Isnaini Wahyu Utomo, I. S. (2019). The Responsibility of Former Notary Employees as a Deed Witness to the Confidentiality of the Deed. ***Res Judicata***, Vol. 2, No. 1, 214.
- [11] Hidayah, K. (2013). Student Understanding Level of Copyright Protection of Written Works (Study of Students of UIN Maulana Malik Ibrahim Malang). ***de Jure, Journal of Sharia and Law***, V Number 1, 52-66.
- [12] I Komang Sujanayasa, I. R. (2016). The Position of Witnesses in Notary Deeds in relation to Article 16 paragraph (1) of Law Number 30 of 2004 concerning the Office of Notary. ***Scientific Journal of Notary Master Study Program***, 2.
- [13] *Great Dictionary of Indonesian*. (t.yr.). Quoted 2020, from <https://kbbi.web.id/cetak>
- [14] Lubis, S. K. (2014). *Ethics of the Legal Profession*. Jakarta: Sinar Grafika.
- [15] Mansyur, A. M. (2015, September - December). Identification of Fair Use/Fair Dealing of Copyright on Books in the Development of Science and Technology in Higher Education in Central Java.
- [16] Marzuki, P. M. (2014). *Legal Research Revised Edition*. Kencana Prenada Media Group.
- [17] Mashdurohmatun, A. (2013). *Developing the Social Function of Indonesian Copyright (A Study on Book Copyright)*. Surakarta: Doctoral Program in Law, Faculty of Law, UNS.
- [18] Muhammad Djumhana, R. D. (2003). *Intellectual Property Rights (IPR): New Industrial Design Regulations*. Bandung: PT. Image of Aditya Bakti.
- [19] Pambudi, H. (1986). *Basic Guidelines for Book Publishing*. Jakarta: Sinar Harapan Library.
- [20] Pomantow, V. (2018). Legal consequences of authentic deeds that are formally defective based on Article 1869 of the Civil Code. *Lex Privatum*, Vol. VI, No.7, p. Sec. 94.
- [21] Raharjo, R. S. (2018, December 31). Legal Protection for the Creator for the Registration of the Same Copyright. *Law Lantern*, 5(3), 437-456.
- [22] Saidin. (1995). *Legal Aspects of Intellectual Property Rights*. Jakarta: PT. Raja Grafindo Persada.
- [23] Simatupang, R. B. (t.thn.). *Legal Aspects in Business*. Jakarta: Rineka Cipta.
- [24] Stephens, B. (2012). *Books and Their Development*. Depok: Rajawali.
- [25] Sjahputra, I. (2007). *Intellectual Property Rights (An Introduction)*. Jakarta: Marvindo.
- [26] Soekanto, S. (2010). *Introduction to Legal Research*. Jakarta: UI Press.
- [27] Sutopo, C. H. (2000). *Qualitative Research Methodology*. Surakarta: UNS Press.