

## Position And Responsibility of The Instrument Witness to the Notarial Act

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### Abstract

*Therefore, clear and firm arrangements are needed regarding the responsibility of the instrument witness in maintaining the confidentiality of the contents of the deed, as well as providing legal consequences for the violation, in order to avoid potential losses from related parties and suppress the emergence of problems that can harm the reputation and integrity of the notary profession. This study is a normative study that studies the purpose of law, the values of justice, the validity of the rule of law, legal concepts, and legal norms. Normative legal research can also be said as a process to find the rule of law, legal principles, and legal doctrines in order to answer the legal issues faced. It can also be said that legal research is carried out to produce arguments, theories, or concepts as prescriptions or answers to the problems faced. Witness instrument has an important role in making a notarial deed, especially to meet the formal requirements that make a notarial deed as an authentic deed with perfect evidentiary power. Instrument witnesses, who are generally notary employees, are in charge of ensuring the correctness of the identity of the parties, witnessing the reading of the deed, as well as signing the deed with the parties. In addition, the instrument witness is obliged to maintain the confidentiality of the contents of the notarial deed. Legal protection for Instrumentalist witnesses when testifying in court is currently still not set firmly and thoroughly, causing a legal vacuum (vacuum norm). In fact, this protection is important so that witnesses are free from pressure or intimidation, and can still carry out their duties according to notary orders. Witness instruments also have the right to protection from the witness and Victim Protection Agency (LPSK) which includes the protection of self, family, and property. However, this protection is more general and has not specifically regulated the position of instrument witnesses as notary employees.*

**Keywords:** *Witnesses, Legal Responsibility, Notarial Act*

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## INTRODUCTION

Notary public plays an important role in fostering community protection and legal clarity. Since notaries deal with fundamental and important issues in all legal proceedings, especially in the field of civil law, they have a very necessary position in this sector. (Vicky, et.all, 2024) therefore, all legal requirements and regulations relating to the role and obligations of notaries must be understood and complied with. (Gaby Handayani S & Janpatar Somamora, 2024) the public officials in question include various parties such as notaries, land deed officials (PPAT), judges, clerks, bailiffs, and civil registration officers. Files or documents made by or in the presence of these officials—for example notarial deeds, judgments from judicial institutions, minutes of hearings, minutes of foreclosures, and official documents such as birth, marriage, and death certificates—are classified as authentic deeds. However, in order to be considered valid as an authentic deed, the preparation of the document must be carried out within the limits of the jurisdiction of the public official concerned. (Teguh Samudera, 1992)

Due to the need for written recording of legal events in both the social and economic spheres, therefore, the authentic deed has an important position in all legal relations in public life and is the most complete and reliable means of proof. (Nur Aini & Yoan Nursari Simanjuntak, 2019)

In the exercise of his professional role, a notary is obliged to provide legal services that are accessible to the whole community, regardless of social background, class or specific group. The obligation is explicitly regulated in Law No. 2 of 2014 which is an amendment of Law No. 30 of 2004 concerning the position of Notary, “Notary is a public official who is the only

authority in making an authentic deed for determination, agreement required by a regulation or by interested parties to be stated in an authentic deed.”

"Notary institutions entered Indonesia at the beginning of the 17th century, namely the government of the Dutch East Indies". Since the reign of the Dutch East Indies in Indonesia, activities in the field of commercial law are generally carried out through deeds made by notaries. According to Notodisoerjo, the existence of notary institutions has been known since the Dutch colonial era, where at first this institution was only intended for citizens of European descent, especially within the scope of civil law. However, along with the development of time, the role of notaries began to open widely so that all levels of Indonesian society can now make agreements officially before notaries. (GHS Lumban Tobing, 1998)

Article 1868 in the *Burgerlijk Wetboek* (BW) or the Civil Code (Civil Code) states that a deed is called authentic when its creation is stipulated by law, drawn up by or in the presence of a public official who has authority, and drawn up in the territory where the official is authorized and signed in accordance with the provisions. Based on this provision, it can be explained that the authentic deed has several main elements, including: the form and procedure for drafting it are regulated by law, must be made by or before an authorized official in accordance with the jurisdiction where the deed is made, and must comply with formal requirements as stipulated in applicable laws and regulations.

Notaries can draw up an authentic deed in violation of applicable law, but they are also responsible for their actions. Drawing up the intentions or actions of the parties and observing, recognizing or verifying in writing that a legal event has occurred between the parties while observing the provisions of the law is an additional task that notaries have in addition to their powers and responsibilities. This allows the parties to establish a civil law partnership. (Dini Anggraeni & Siti Mahmudah, 2023)

A document designed and signed by or in the presence of a notary public has the status of an authentic deed, the form and procedure for drafting of which have been specified in the provisions of the law on notarial positions. Article 58 paragraph (2) Notary Law implicitly groups two types of deeds within the scope of Notarial authority, namely deeds prepared directly by notaries (door notaries) and deeds made before notaries (*ten overstaan van notaries*). The first type is known as a *relaas* deed or minutes, which is an official note made by a notary based on what he has seen or witnessed directly against a legal act at the request of a certain party. Meanwhile, the second type is a deed that contains a statement from the perpetrators, which is then formulated by a notary into an official deed form at their request; this type is often referred to as a deed of the parties.

In practice, a notary requires the presence of witnesses whose role is to listen, observe, and witness firsthand every action or legal event that takes place. In the making of a deed by a notary, a minimum of two witnesses is required, or more if conditions and conditions require it, as part of the formal elements that determine the validity of the deed according to the law according to the Notary Office Law Article 40 paragraph (1) which reads: "(1) every deed read by a notary is attended by at least 2 (two) witnesses"

In Notarial Practice, there are two categories of witnesses involved in the process of making a deed, namely instrumentalist witnesses and identifying witnesses. Instrument witnesses are witnesses who are legally required to be present in the process of drafting a notarial deed. Their responsibilities include signing the deed as well as testifying to the truth of the facts contained in the deed, including the fulfillment of formal elements as stipulated by laws and regulations. Generally, the instrument witness is an employee of the notary office. On the other hand, the identifying witness serves to introduce the parties present before the notary. The presence of instrument witnesses is absolute, and in certain situations, the number of witnesses can be increased as needed.

In practice, instrumentalist witnesses are often positioned on a par with witnesses who have directly seen and heard a legal act. Law enforcement officers often call instrumental witnesses whose names are listed in a notarial deed as part of an effort to find out the material truth. This summons usually aims to obtain preliminary information that can be used as a basis for calling the notary concerned. However, the information that can be conveyed by the instrument witness is limited only to the administrative process of making the deed until the legal action takes place between the parties who signed the deed.

Notary Law so far has not specifically regulated the legal protection for instrument witnesses when summoned to trial in connection with legal issues over the notarial deed made. Laws and regulations in Indonesia stipulate notaries in order to meet the public's desire for legitimate written documentation of legal events, circumstances, and activities. (Kunni Affifah, 2017) the existing regulations only explain the requirements to be an instrument witness, without containing provisions regarding the position and legal protection for the witness. As a result of the absence of rules that specifically regulate the protection of instrumental witnesses, a legal vacuum arises in this aspect. In fact, the role of instrument witnesses is vital in ensuring the validity and legality of a notarial deed. Therefore, a detailed and firm regulation is needed to provide legal protection guarantees to instrument witnesses. This is important in order to maintain the position of a notarial deed as an authentic document that has full evidentiary power, so as not to lower its degree to a deed under hand that has the potential to cause harm to interested parties.

Marina Dhaniaty's (2019) research entitled "The Position of Instrumental Witnesses in Notarial Deeds that Cause Problems in Civil Cases" discusses how the position of instrumental witnesses in notarial deeds is very important in order to fulfill the requirements of authentic deeds that have full evidentiary force. Instrumental witnesses are required to ensure that the formalities stipulated by law are fulfilled, such as the reading of the deed by the notary to the parties before signing. Instrumental witnesses are also responsible for ensuring the presence of the parties before the notary, the accuracy of their identities, and that the deed is signed in accordance with the procedure. Thus, the role of the instrumental witness is to certify the authenticity of the deed in accordance with its nature and form.

## RESEARCH METHODS

This study uses normative legal research, which examines legislation, legal theories, and jurisprudence relevant to the issue under study. In the normative legal approach, the data used generally comes from secondary sources, such as legal literature, regulations, legal theories, and the views of legal experts. This study is a normative study that studies the purpose of law, the values of justice, the validity of the rule of law, legal concepts, and legal norms. Normative legal research can also be said as a process to find the rule of law, legal principles, and legal doctrines in order to answer the legal issues faced. It can also be said that legal research is carried out to produce arguments, theories, or concepts as prescriptions or answers to the problems faced. (Peter M. Marzuki, 2023)

The data collection method in this study was conducted through library research, namely by compiling primary legal materials such as laws and regulations, secondary legal materials in the form of studies, scientific journals, or previous research, as well as tertiary legal materials such as dictionaries and encyclopedias.

## RESULT AND DISCUSSION

Instrument witnesses are parties who are directly involved in the stages of making a notarial deed, so they have an understanding of the contents of the deed. Based on applicable regulations, their role can be categorized as witnesses as stated in Article 171 HIR. However, within the scope of criminal cases, instrumentalist witnesses are not included in the scope of Article 322 of the Criminal Code regarding the obligation to keep official information confidential, since their status is not as a professional official, but generally only as a notary employee. (Putra Mekka M. F & Nabilah Ananda Priyanka, 2022)

In carrying out duties in a notary office environment, the instrument witness has the responsibility not only as a witness in the deed, but also in ensuring the accuracy and suitability of the identity data of the parties before the signing process takes place. This task is carried out under the direct guidance of a notary. The existence of witness instruments not only aims to fulfill the formal aspects in the preparation of the deed, but also to provide legal support to the notary if the deed later becomes the subject of a dispute by one of the parties. In addition, the witness instrument can be used as a means of proof in court, with the value of evidence equivalent to the testimony of other witnesses or confessions. However, the scope of their testimony is limited only to the stages of the implementation of the creation and signing of the deed, without being obliged to understand, remember or save the contents of the deed read by the notary. (Ida Ayu Kade Kusumaningrum, et.all, 2017)

Instrumentalist witnesses, who generally come from notary staff or employees, are not burdened with the obligation to understand the entire contents of the deed and cannot be held responsible for the content or substance of the deed. Their responsibilities are limited to the moment the deed is passed and to those aspects of the formalities that are their duty by order of the notary. These tasks include drafting the deed, matching personal data through the verification process, preparing documents related to the parties to be included in the deed, witnessing the reading and signing of the deed directly, and also signing the deed as part of his role as an instrumentalist witness. However, there is still ambiguity in the legal provisions contained in the Notary Public Act regarding the responsibility of instrumentalist witnesses. Therefore, the legislator should provide improvements and clarity regarding the status of instrumentalist witnesses, including their rights and obligations in relation to the authentic deed.

According to Sajipto Raharjo, legal protection is an effort to protect human rights against people who are harmed, as well as providing protection to the community so that they can exercise their rights protected by law. (Inge Kalista Hikmasari, 2023) A legal effect is any form of consequence that arises as a result of a legal action carried out by a subject of law against a specific object of law, or it is an impact that is judicially recognized by law as a result of an event that has occurred and has legal relevance.

The deed document drawn up by a notary must be presented in its entirety in the presence of the parties involved and witnessed by witnesses. In this reading stage, the instrumentalist witness—who is generally a staff of the notary's office—has the obligation to pay close attention, as well as verify the validity of the identity of the parties mentioned in the deed. In addition, the instrument witness must also be able to ensure that the reading of the deed is carried out orally by a notary with a clear voice, and ensure that all parties present understand the content and intent of the contents of the deed submitted. (Baihaqy Prianto Adi, 2020)

In this context, the Notary is required to present two witnesses in the process of making the deed, where their identity and legal capacity must be expressly stated in the document. This provision refers to Law No. 2 of 2014 on notary positions, specifically Article 40, which regulates the criteria for individuals who can act as instrumentalist witnesses, including the requirement that the witness must be personally known by the notary. If the notary does not present the two witnesses as arranged, the deed drawn up loses its status as an authentic deed and is only

considered a deed under hand. An agreement may be canceled if the subjective conditions are not met. This means that if someone wants to cancel it, the agreement is null and void. The agreement is not legally valid if the objective standards are not met, which means that there was never a bond and that the agreement never existed in the first place. (Pius Eliadi Hia, et.all, 2024)

Basically, a notary public has the responsibility of creating a legal document in the form of an authentic deed that has a legally valid and unquestionable force of proof. In order for the deed to comply with the validity provisions as stipulated in Law Number 2 of 2014 concerning amendments to the Notary Office Act, the involvement of witnesses in the process of drafting the deed becomes an element that cannot be ignored.

Instrumentalist witnesses have fundamental differences with other types of witnesses, because instrumentalist witnesses are individuals who are directly tied to the position of notary, generally employees who work in the notary's office. They have been known and trusted by notaries to carry out certain duties and responsibilities, so they are appointed as instrument witnesses. Therefore, the position of the instrumentalist witness is different from that of the external witness brought or presented to the notary, since both have different functions and roles in relation to the notarial process.

In addition to carrying out their duties as part of the formal requirements in the process of validity of a notarial deed, instrument witnesses also have an important role in providing legal protection for notaries if in the future the deed is at issue by parties who feel disadvantaged or interested. Witness instruments can also serve as evidence that has evidentiary value equivalent to witness testimony or confession in a trial. The information given before the judge is related to the obligation of the witness to follow the entire process of making the notarial deed and his participation in the signing of the deed. This is very important in order to ensure that the identity of the parties can be ascertained true and there is no error between the original identity carried by the parties and also the identity written in the deed.

In addition to performing its function as part of the formal requirements in the process of ratification of Notarial deeds, witness instrument also has an important role in providing protection for notaries, especially if in the future the deed made into the subject of dispute by interested parties. In addition, the witness instrument also serves as one of the evidentiary tools that can testify before a panel of judges in a judicial process, with an evidentiary value equivalent to evidence in the form of testimony or confession. The information presented by the instrument witness in the trial is generally related to his obligation to follow the entire procedure for making the deed and also sign the deed as a form of formal validity. (Ida Ayu Kade Kusumaningrum, et.all, 2017)

Instrumentalist witnesses, who generally come from the staff or employees of notaries, have no obligation to understand the entire contents of the deed and do not bear responsibility for the substance or content of the deed. Their roles and responsibilities are limited to the formal aspect when the deed is passed, in accordance with the duties entrusted by the notary. These duties include, among others, drafting the initial draft of the deed, verifying the personal data of the relevant parties, preparing relevant supporting documents, witnessing firsthand the reading and signing of the deed, and also providing signatures as part of their formal role in the capacity of instrument witnesses.

In proceedings involving a dispute over a notarial deed, the witness called to testify is usually an employee of the notary office concerned. The testimony presented by the witness is limited only to the scope of the duties and responsibilities that he carries out in order to carry out the instructions that come directly from his superiors, that is, the notary in question. Based on the provisions contained in Article 1365 of the Civil Code, and taking into account the elements contained in it, the civil legal responsibility that can be imposed on the instrument witness in the event of a violation in the form of disclosure of the contents of a confidential notarial deed, can be explained as follows:

## 1. Elements of unlawful acts

The act of an instrument witness in divulging secrets contained in a notarial deed to a party who is not interested outside that has been determined by law is an act that can be called contrary to the propriety that prevails in society. In this case, other people can be considered violated and an act of leaking a secret is something that should not be done at will, because it can be said to be an act against the law. The Supreme Court of the Netherlands (*Hoge raad*) in 1991, which handled the case of secret leaks, that the Dutch Supreme Court revealed that the actions of the instrument witnesses who leaked the contents of the notarial deed to parties who did not have an interest were classified as unlawful acts.

## 2. Involved in harmful acts

That has been remembered that notarial deed is confidential and should be kept secret against the parties who do not have an interest. There are several aspects that say that the act is harmful, that witnesses to the deed leaked the contents of the deed can harm what is meant here is that it has been explained that the losses caused are losses that are material and immaterial. Thus, if it can be proven that there is an adverse action from the actions of the notarial deed witness who leaked the contents of the notarial deed to a party that does not have an interest, then the element of causing the loss can be fulfilled.”

In this context, the instrumentalist witness is not burdened with the responsibility of memorizing the contents of the deed drawn up. However, in his capacity as a witness, he has personal responsibility for what he has seen and witnessed firsthand, especially in relation to the fulfillment of the formal elements in the process of ratification of the deed as stipulated in the provisions of the law regarding the position of Notary. After the observation of the notary position law and the Civil Code of witness instrument position is divided into 2 (two), namely:

1. First, the position of the witness instrument as part of the fulfillment of formal elements in the preparation of a notarial deed. A deed is considered valid and complete when all formal requirements have been met, including the presence of instrumental witnesses. This gives the deed full force of evidence, and the instrumentalist witnesses listed in the deed can be held legally liable for their involvement. This provision is reflected in Article 38 paragraph (4) letter c and Article 40 paragraph (1) of the Notary Office law, as well as Article 1868 of the Civil Code; and
2. Second, the role of the instrumentalist witness is related to the notary's responsibility to maintain the confidentiality of all information and processes related to making the deed. This includes all stages of preparation until the deed is completed, as stipulated in Article 16 Paragraph (1) letter f and Article 40 of the Notary Office Law.

According to the labor law that the witness of the instrument is classified as a worker / worker who performs his duties and work on orders from superiors where it can be drawn an explanation that a notary employee who is as good as the witness of the instrument is a worker/worker who cannot be prosecuted for his work because a notarial deed needs to get approval from his boss, namely an employer/notary himself. Instrument witness can only give his statement in court to the extent of his responsibility until a deed can be signed, instrument witness does not have the right and authority to open the entire contents of the deed, especially related to the contents of the data that should be kept secret both by notaries and by notary employees who are also instrument witnesses, if this happens, it can be considered a tort if there are parties who do not accept the data leaked in court related to confidential data and can cause harm in the form of civil or civil damages for confidential data leaked before the court.

Therefore, there is a need for clear and firm regulations that specifically regulate the position of notary employees as instrument witnesses, especially in terms of providing information related to notarial deeds. In addition, it is also necessary to regulate the obligation for investigators and public prosecutors to first apply to certain professional institutions before summoning them. The main purpose of this arrangement is to provide protection as well as a sense of security, so that they are free from pressure or intimidation. Although the responsibility

for the content of the deed lies entirely with the notary if legal issues arise in court, this does not mean that the instrumentalist witness cannot experience psychological pressure due to his statement. This is important because of the labor and power relationship between the notary and his employees who act as instrumentalist witnesses.

Thus, the witness, who is an employee of the notary when testifying in court regarding a notarial deed, is only responsible for the performance of the duties that have been imposed by the Notary as his superior. The responsibility is limited to the formal aspects of the procedure in the process of passing the deed, as well as covering matters explicitly ordered or commissioned by the notary during the process of preparation and drafting of the deed takes place. (Glory Bastian, 2019) the existence of rules that require instrument witnesses to maintain the confidentiality of the contents of the notarial deed, accompanied by the imposition of sanctions for violation of these obligations, aims to prevent legal issues related to notarial practices and disputes between the parties listed in the deed in the future. Therefore, clear and firm arrangements are needed regarding the responsibility of the instrument witness in maintaining the confidentiality of the contents of the deed, as well as providing legal consequences for the violation, in order to avoid potential losses from related parties and suppress the emergence of problems that can harm the reputation and integrity of the notary profession.

## CONCLUSION

Witness instrument has an important role in making a notarial deed, especially to meet the formal requirements that make a notarial deed as an authentic deed with perfect evidentiary power. Instrument witnesses, who are generally notary employees, are in charge of ensuring the correctness of the identity of the parties, witnessing the reading of the deed, as well as signing the deed with the parties. In addition, the instrument witness is obliged to maintain the confidentiality of the contents of the notarial deed. Legal protection for Instrumentalist witnesses when testifying in court is currently still not set firmly and thoroughly, causing a legal vacuum (vacuum norm). In fact, this protection is important so that witnesses are free from pressure or intimidation, and can still carry out their duties according to notary orders. Witness instruments also have the right to protection from the witness and Victim Protection Agency (LPSK) which includes the protection of self, family, and property. However, this protection is more general and has not specifically regulated the position of instrument witnesses as notary employees.

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