

Legal Certainty in Fulfilling the Obligation to Refuse to Be an Instrumental Witness and the Impact of Violations on Notaries

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Abstract. *Notaries are required to keep the contents of authentic deeds confidential, but the obligation of confidentiality or the right of recusal for instrumental witnesses who are also aware of the substance of the deed has not been regulated, thus creating a normative vacuum (leegstand van normen). This study aims to analyze the legal certainty regarding the right of recusal for instrumental witnesses in refusing to provide information on the contents of authentic deeds they know. This normative legal research uses a statutory, conceptual, and analytical approach, with secondary data in the form of primary, secondary, and tertiary legal materials, which are analyzed descriptively qualitatively using Gustav Radbruch's Legal Certainty Theory and Hans Kelsen's Legal Responsibility Theory. The results of the study indicate that the normative vacuum regarding the right of recusal for instrumental witnesses harms the value of legal certainty; Notaries have the potential to face indirect civil liability, administrative risks, and reputational risks if the instrumental witnesses disclose the contents of the deed; and the format of wills that are commonly made does not include a confidentiality clause for instrumental witnesses, even though wills are classified as the most sensitive deeds.*

Keywords: *Authentic; Confidentiality; Instrumental; Legal; Obligation.*

1. Introduction

The state, through legislation, authorizes notaries as public officials authorized to create authentic deeds based on the wishes of the parties. The existence of notaries serves as an extension of the state in providing legal certainty and legal

protection for the public, as authentic deeds drawn up before a notary can serve as valid evidence to prevent future defaults.¹

The preparation of an authentic deed by a Notary must be in accordance with the wishes of the interested parties, while maintaining the confidentiality of all the contents of the deed as a duty inherent in his position. In line with this obligation, the Notary is also required to read the deed before the parties in the presence of at least two witnesses, known in notarial practice as deed witnesses or instrumental witnesses.²

In notarial practice, there are two types of witnesses: identifying witnesses and instrumental witnesses. Identifying witnesses are generally brought by the interested parties, while instrumental witnesses are witnesses to the deed whose presence is mandatory, generally coming from the Notary's office staff or a trusted and known person of the Notary. The presence of instrumental witnesses is intended as a form of legal protection for the Notary if in the future there is a default on the deed that has been made, so that instrumental witnesses are required to listen to, know, and understand the entire contents of the deed that is read.

The problem is that the legal guidelines for the office of Notary Public only impose an obligation to maintain the confidentiality of the contents of the deed on the Notary Public, without regulating a similar obligation for instrumental witnesses. This situation indicates a lack of norms (*leegstand van normen*) regarding the obligation of instrumental witnesses to maintain the confidentiality of the contents of the deed they know, even though they actually know the entire substance of the deed, including personal data, financial conditions, and sensitive agreements of the parties appearing before them.

Unlike notaries who are bound by an oath of office and are threatened with administrative and civil sanctions if they violate their confidentiality obligations, instrumental witnesses are not bound by similar oversight mechanisms. The absence of a code of ethics, oath of office, or threat of sanctions for instrumental witnesses creates a disparity in legal responsibility between two parties who both know the full contents of the deed. This situation has the potential to cause double harm: on the one hand, the parties appearing can be harmed if confidential information is disclosed to unauthorized parties, and on the other hand, the notary bears the reputational and legal risks for the actions of instrumental witnesses that are beyond his or her direct control.

¹Indonesia, Law Number 30 of 2004 concerning the Position of Notary as amended by Law Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning the Position of Notary, Article 1 number 1 and Article 15.

²Indonesia, Law Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning the Position of Notary, Article 16 paragraph (1) letter f and letter m.

A comparison with several other countries' notary legal systems shows that this issue is cross-jurisdictional. In the Dutch system, the obligation of witness confidentiality is addressed through the ethical guidelines of professional organizations; in the French system, confidentiality is treated as an obligation inherent in the entire deed-making process, thus implicitly including witnesses; while in Japan, witnesses are not burdened with formal obligations equivalent to those of notaries. This situation confirms that the lack of norms regarding the confidentiality of instrumental witnesses is not merely a local issue, but a structural challenge faced by various notary legal traditions.

Previous studies have touched on the issue of the obligation of confidentiality of instrumental witnesses, including studies on the legal responsibility of Notaries towards instrumental witnesses who reveal the secrets of authentic deeds, as well as studies on the legal certainty of the obligation of instrumental witnesses in maintaining the confidentiality of authentic deeds and their legal consequences for Notaries. However, these studies have not specifically linked this issue to Gustav Radbruch's Theory of Legal Certainty and Hans Kelsen's Theory of Legal Responsibility simultaneously, nor have they linked it to concrete examples of wills as the type of deed with the most sensitive confidentiality, so there is a research gap that is important to be studied further.³

This study aims to analyze and describe the legal certainty regarding the right of recusal of instrumental witnesses in refusing to provide information regarding the contents of authentic deeds that they know.

2. Research Methods

This research uses a normative legal research method with a statute approach, a conceptual approach, and an analytical approach. The research specification is descriptive analytical, which describes and analyzes the gaps in norms regarding the obligation of confidentiality and the right of recusal of instrumental witnesses. The data used are secondary data consisting of primary legal materials in the form of laws and regulations related to the position of Notary, secondary legal materials in the form of books, scientific journals, and scientific papers on notary affairs, and tertiary legal materials in the form of legal dictionaries and encyclopedias. The data collection method is carried out through library research, namely the search and review of primary, secondary, and tertiary legal materials relevant to the problem being studied. The collected data are then

³Diatmika, I Putu Edi., & Danyathi, Ni Luh Made Mahendra. (2021). "Legal Responsibility of Notaries to Instrumental Witnesses Who Reveal the Secret of Authentic Deeds". in *Acta Comitas: Journal of Notary Law*, Vol. 6, No. 2, pp. 305-318; Diatmika, I Dewa Gede Agung Putra., & Danyathi, APL (2023). "Legal Certainty of Instrumental Witnesses' Obligations in Maintaining the Confidentiality of Authentic Deeds and Their Legal Consequences for Notaries". in *Acta Comitas: Journal of Notary Law*, Vol. 8, No. 1, pp. 140-142.

analyzed descriptively qualitatively using Gustav Radbruch's Theory of Legal Certainty and Hans Kelsen's Theory of Legal Responsibility as analytical tools.

3. Results and Discussion

3.1. Legal Certainty Regarding the Right of Instrumental Witnesses to Refute

In daily notarial practice, it is not uncommon to find situations where instrumental witnesses, who generally hold the position of employees of the Notary's office, are asked for information by third parties, either by one of the parties in a dispute after the signing of the deed, by investigators in the process of investigating a criminal act suspected of being related to the transaction in the deed, or by the court in the process of civil evidence. When the Notary in question uses his right of recusal, the question that arises is whether the instrumental witness who was present, heard, and knew all the contents of the deed has the right or even an equal obligation to refuse to provide the same information. In many cases, instrumental witnesses who are summoned as witnesses do not have a clear legal umbrella to refuse, so that their steps depend entirely on personal discretion or internal directives of the Notary's office, not on formally binding legal norms.

The right of denial (*verschoningsrecht*) held by a Notary is a privilege granted by law as a logical consequence of his official obligation to keep everything regarding the deeds he makes confidential. The legal construction is that the obligation of confidentiality gives rise to the right of denial: the Notary has an obligation, so he is also given the right to refuse to disclose this obligation to unauthorized parties. The problem is, the same construction does not apply to instrumental witnesses, because the Notary's job regulations do not impose any obligation of confidentiality on him, so logically no right of denial can arise for him. This vacuum is hierarchical: the vacuum of norms at the level of obligations (primary rule) causes a vacuum of norms at the level of derivative rights (secondary rule), so that when an instrumental witness is faced with a request for information from a third party, he has no formal legal basis to refuse, in contrast to a Notary who has a clear legal basis and is even strengthened through the approval mechanism of the Notary Honorary Council.

In practice, some notary offices attempt to fill this gap through internal instruments, such as confidentiality clauses in employment agreements (confidentiality clauses) between notaries and their employees acting as instrumental witnesses. However, such instruments are contractual and only binding internally (*inter partes*), so they lack external force (*erga omnes*) as a public legal norm. When an instrumental witness is summoned by an investigator or the court, the internal confidentiality agreement cannot be used as a basis for refusing to testify, because the obligation to provide truthful information in legal proceedings is a public norm that cannot be deviated from by private

agreements. Therefore, the lack of statutory regulations makes these internal efforts inadequate to provide true legal certainty.

A comparison with other countries' notarial legal systems demonstrates the cross-jurisdictional nature of this issue. In the Dutch system, notaries' confidentiality obligations are expressly stipulated in the notary's professional regulations, while instrumental witnesses are not explicitly burdened with such obligations; this gap is filled through the ethical guidelines of notary professional organizations, which indirectly bind all parties involved in the deed's creation. In the French system, confidentiality is treated as an obligation inherent in the entire deed-making process (*attachée à la fonction*), so that all parties who know the contents of the deed are considered to be bound by the obligation of silence (*devoir de discrétion*). In Japan, witnesses are also not burdened with formal obligations equivalent to those of notaries, but local lawyers' organizations have developed practical guidelines that advocate the importance of confidentiality, although not formally binding. This comparison demonstrates two distinct approaches, while Indonesia, with its lack of regulation in the notary's professional regulations or broadly binding ethical guidelines, has not fully adopted either model.

Judging from Gustav Radbruch's Theory of Legal Certainty, which emphasizes three basic legal values: justice, utility, and legal certainty, the value of legal certainty in the issue of the right of recusal of instrumental witnesses has clearly not been fulfilled. Legal certainty requires that every legal subject, in this case instrumental witnesses, be able to know precisely what their rights and obligations are when faced with a request for information from a third party. The absence of clear norms leaves the position of instrumental witnesses in a legal gray area, where they can choose to disclose information without being legally blamed, but on the other hand, their actions have the potential to harm the Notary and the parties appearing before them.

Based on the above description, it was found that the legal certainty regarding the right of recusal of instrumental witnesses in refusing to provide information regarding the contents of an authentic deed that they know until now does not have a clear legal basis. The right of recusal has so far only been attached to the Notary, without being extended to instrumental witnesses who in fact also know the entire substance of the deed, resulting in a normative vacuum that harms the value of legal certainty.

3.2. Legal Consequences for Notaries If Instrumental Witnesses Do Not Fulfill Obligations to Deny

Viewed from the civil law aspect, the Notary's responsibility for the actions of the instrumental witness who leaks the contents of the deed cannot be based directly on the Notary's job regulations, considering that the obligation of

confidentiality is textually only directed to the Notary, not to the instrumental witness. However, the Notary's civil responsibility can still arise through other channels, namely the provisions regarding unlawful acts (*onrechtmatige daad*) in Article 1365 of the Civil Code, especially if it can be proven that there is an element of negligence on the part of the Notary in selecting or supervising the instrumental witness he presents. If the instrumental witness is an employee of the Notary's office, it is also relevant to apply Article 1367 of the Civil Code regarding the superior's responsibility for losses incurred by his subordinates (vicarious liability), as long as the act is related to the scope of the assigned work.

A critical aspect in the context of civil liability is the issue of proof. Based on the principle of *actori incumbit probatio*, the claimant must cumulatively prove the existence of an employment relationship between the Notary and the instrumental witness, as well as a direct link between the act of leaking the contents of the deed and the scope of the witness's work. Proving an employment relationship is relatively easy because it can be documented through an employment agreement, but proving the link between the act and the scope of work is a much more complex issue and depends on the specifics of the case (case-by-case basis), especially if the leaking occurred outside the office and on the personal initiative of the instrumental witness.

In addition to civil liability, a Notary may face administrative liability if proven negligent in carrying out his/her official duties, including the obligation to act diligently in selecting and presenting instrumental witnesses. The Notary Supervisory Board may examine whether the leak of the deed's confidentiality occurred due to systemic negligence by the Notary, such as the lack of adequate internal procedures, rather than solely due to the individual actions of the instrumental witnesses beyond the Notary's reasonable control. From the aspect of the validity of the deed, the leak of information by the instrumental witnesses does not in itself invalidate the validity of the authentic deed, as long as all formal and material requirements for the deed's creation have been met. However, such a leak has the potential to reduce public trust in the confidentiality value inherent in the notarial institution, so that the trust value that underlies the use of Notary services can be eroded and impact the Notary's professional reputation.

In terms of professional responsibility, the Notary Honorary Council in practice has shown a tendency to comprehensively assess whether a Notary has adequately carried out his/her supervisory responsibilities, including in the selection and supervision of instrumental witnesses. If it is proven that a Notary has not implemented adequate internal procedures to maintain the confidentiality of client information, the Notary Honorary Council has the potential to impose ethical sanctions in the form of warnings, reprimands, or even revocation of the right to hold office for a certain period. These ethical

sanctions, although internal to the professional hierarchy, have significant practical impacts because they can affect the Notary's professional reputation and public trust in the Notary's office in question.

Based on Hans Kelsen's Theory of Legal Responsibility, legal responsibility can only be imposed if there is a norm that expressly regulates it. Because the regulations of the Notary's office do not explicitly impose an obligation of confidentiality on instrumental witnesses, the legal consequences for the Notary for violation of the obligation of denial by the instrumental witness are indirect liability. Nevertheless, the Notary still needs to take preventive legal protection measures, including through the implementation of adequate selection procedures and supervision of the instrumental witnesses involved, as well as the preparation of internal documentation that can serve as evidence that the Notary has acted with reasonable care (duty of care) in carrying out his/her duties.

Based on the description, the results obtained are that the legal consequences for a Notary if the instrumental witness does not fulfill his obligation to deny are indirect, but the Notary still has the potential to bear the risk of civil liability through the principle of superior responsibility, administrative risks in the form of warnings or examinations by the Supervisory Board or the Notary Honorary Board, as well as reputational risks that can reduce public trust in the notarial institution, even though in formal juridical terms the error originates from the instrumental witness, not from the Notary himself.

3.3. Example of a Deed of Will that Complies with the Provisions of the Applicable Law

The highly personal nature of a will makes the role of an instrumental witness more significant than that of a general deed. The contents of a will typically contain sensitive matters, such as the unequal distribution of assets to certain heirs, the recognition of illegitimate children, the exclusion of one of the heirs, and the appointment of an executor of the will (*executeur testamentair*). Leakage of such information before the testator's death has the potential to cause family conflict and psychological and social stress for the testator. Unlike a notary, who is obligated to keep the contents of the deed confidential and is subject to an oath of office, an instrumental witness present at the reading of a will knows the full substance of the testator's wishes but is not bound by the same legal obligation to keep them confidential. This condition is a paradox in itself, because a will is a type of deed that is explicitly regulated so that its confidentiality is strictly maintained, as reflected in the prohibition on providing a copy of the will while the testator is alive, but a similar obligation is not extended to instrumental witnesses who actually know the contents of the will since the process of making it took place.

To strengthen the analysis regarding the urgency of confidentiality in wills, the following presents a comparison of the three types of wills recognized in the Civil Code in terms of the level of involvement of instrumental witnesses and the risk of confidentiality.

Form of Will	Legal basis	Involvement of Instrumental Witnesses	Confidentiality Risk Level
Holographic Testament	Article 936 of the Civil Code	Not involved in the manufacturing process	Low
Secret Testament	Article 937 of the Civil Code	Present at the handover and sealing, not knowing the contents	Currently
General Will	Articles 938-939 of the Civil Code	Listen to the complete reading, know the entire content	Tall

Source: Adapted from Civil Code Articles 936-939, 2026.

This comparison shows that a general will is the type of will most vulnerable to the risk of information leaks by instrumental witnesses, and also provides the most concrete evidence regarding the urgency of regulating the confidentiality obligations of instrumental witnesses. All three forms of wills lead to the same conclusion: the greater the access of instrumental witnesses to the contents of the deed, the greater the need for adequate regulation of confidentiality obligations. Reviewing the anatomy of a commonly made notarial will, the format used is formally in accordance with the provisions regarding the deed header, the deed content, and the deed closing, containing the identity of the testator, the testator's last wishes, the appointment of heirs and executors of the will, the reading of the deed before witnesses, and the signing by the appearer, witnesses, and the Notary. However, in the standard structure of the deed there is not a single clause that explicitly requires a statement of confidentiality from the instrumental witnesses present to witness the reading.

In order to fill this normative gap while awaiting legislative updates, Notaries can take concrete preventive steps by strengthening the wording and procedures in the preparation of notarial wills. First, Notaries can include an explicit clause in the will stating that the instrumental witnesses present are obliged to maintain the confidentiality of the entire contents of the will and are prohibited from disclosing any information regarding the contents of the will to third parties, either during the testator's lifetime or after his death, except with the written order or permission of the testator or authorized heirs. Second, Notaries can implement a procedure for signing a separate confidentiality declaration by each instrumental witness before or immediately after the reading of the will, which contains the witness's awareness and agreement to maintain confidentiality and the legal and ethical consequences if a violation occurs. Third, Notaries can consider limiting the information obtained by instrumental witnesses to only

those parts of the deed that really need to be heard, as long as it does not conflict with the provisions regarding the obligation to read the deed in full before witnesses.

Based on the above description, it was found that the format of the will deed commonly made by Notaries is formally in accordance with the provisions of the applicable laws, however, the gap in the norm regarding the obligation of confidentiality of instrumental witnesses that has been identified also applies and is even more crucial in the context of will deeds. The addition of a clause stating the confidentiality of instrumental witnesses in the structure of will deeds is a practical-preventive step that can be immediately implemented by Notary offices without having to wait for changes in the law.

4. Conclusion

Legal certainty regarding the right of recusal of an instrumental witness in refusing to provide information on the contents of an authentic deed that he knows until now does not have a firm legal basis, because the right of recusal has so far only been attached to the Notary without being extended to the instrumental witness who in fact also knows the entire substance of the deed, so that in terms of Gustav Radbruch's Theory of Legal Certainty there is a normative vacuum that harms the value of legal certainty. The legal consequences for the Notary if the instrumental witness does not fulfill his obligation to recusal are indirect according to Hans Kelsen's Theory of Legal Responsibility, but the Notary still has the potential to bear the risk of civil liability through the principle of superior responsibility, administrative risks in the form of examination by the Supervisory Board or the Notary Honorary Board, as well as reputational risks. Examples of wills show that the commonly made format is formally in accordance with applicable provisions, but does not contain a single clause requiring a statement of confidentiality from the instrumental witness, even though wills are classified as deeds with the highest level of sensitivity, so this vacuum has real practical implications and urgently needs to be regulated.

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