



The normative gap in the confidentiality of deeds by instrumentary witnesses and its legal consequences for notary liability under Indonesian law

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ABSTRACT

This study aims to analyze the normative gap regarding the obligation of confidentiality of instrumentary witnesses in the drafting of authentic deeds and its implications for notarial liability within the framework of positive law in Indonesia. The novelty of this study lies in its focus on the unregulated legal position of instrumentary witnesses in relation to deed confidentiality, an issue that has received limited attention in previous notarial legal studies which generally emphasize notary obligations only. The study also offers an explicit scientific contribution by constructing the legal relationship between witness confidentiality obligations and notary liability through the integration of civil, criminal, and personal data protection perspectives. The method employed is normative legal research using statutory and conceptual approaches through analysis of Article 16 paragraph (1) letter e, Article 38, and Article 40 of Law Number 30 of 2004 concerning Notary Office as amended by Law Number 2 of 2014, Article 1868 of the Indonesian Civil Code, Articles 1365 and 1367 of the Indonesian Civil Code, Article 322 of the Criminal Code, and Law Number 27 of 2022 concerning Personal Data Protection. The results identify three principal findings. First, there is a normative gap because instrumentary witnesses have direct access to deed contents but are not expressly bound by statutory confidentiality obligations, creating legal uncertainty in notarial practice. Second, despite the absence of explicit regulation, instrumentary witnesses may still incur civil liability under Article 1365 of the Civil Code and potential criminal liability under Article 322 of the Criminal Code when disclosure causes legal harm. Third, notaries may remain responsible under the principle of prudence and supervisory liability under Article 1367 of the Civil Code, resulting in disproportionate allocation of legal responsibility. Practically, it supports the need for reformulation of notarial norms to establish explicit confidentiality obligations for instrumentary witnesses and ensure proportional legal protection for all parties.

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1. Introduction

Law as an instrument regulating social life continuously develops in response to social dynamics and legal needs in society (Muhammad *et al.*, 2025). One of its essential functions is to provide legal certainty, justice, and protection in civil legal relations, particularly in legal transactions requiring valid and accountable evidence (Afifah, Fatma, Sri, 2024). In this context, authentic deeds prepared by notaries constitute legal instruments possessing perfect evidentiary value as regulated under Article 1868 of the Indonesian Civil Code, thereby making the notary a central public official in guaranteeing the legality of civil legal acts (Melinda & Djajaputra, 2021).

The legal phenomenon addressed in this study arises from the practical involvement of instrumentary witnesses in notarial deed formation who, despite having direct access to confidential deed contents, are not expressly bound by statutory confidentiality obligations under Indonesian notarial law. In daily notarial practice, instrumentary witnesses are commonly employees of the notary office who attend the reading, signing, and formal execution of authentic deeds as required under Article 40 of Law Number 30 of 2004 concerning Notary Position as amended by Law Number 2 of 2014. Their formal role is indispensable because the absence of witnesses may degrade an authentic deed into a private document. However, although they directly hear and read confidential legal information contained in deeds, the law only explicitly imposes confidentiality obligations upon notaries under Article 16 paragraph (1) letter f of the Notary Position Law.

This legal asymmetry creates a concrete practical problem because information disclosed by instrumentary witnesses may cause losses to the parties involved in deeds, particularly in transactions containing sensitive personal, family, or business information. In several practical situations, instrumentary witnesses as internal employees may retain copies, hear negotiations, and understand legal positions of the parties, thereby creating a real risk of information leakage outside formal legal procedures. Yet, unlike notaries, witnesses are not expressly regulated regarding confidentiality duties, legal sanctions, or procedural limits in giving testimony concerning deed contents.

Previous legal studies on notarial confidentiality have primarily focused on the professional secrecy obligations of notaries, ethical duties in notarial office, and the legal force of authentic deeds (Habib & Agustini, 2022; Purnayasa, 2019; Syarifudin, 2022). Other studies have discussed witness requirements only from the perspective of formal deed validity and procedural completeness (Rahmadany & Subekti, 2024). However, previous research has not specifically examined the normative legal position of instrumentary witnesses as parties who directly access confidential deed information but remain outside explicit confidentiality regulation. This shows a research gap concerning the distribution of confidentiality obligations and legal responsibility between notaries and witnesses in notarial practice.

The unresolved problem becomes more significant because legal responsibility may still arise through general legal constructions outside the Notary Position Law. Disclosure of deed information by instrumentary witnesses may be categorized as an unlawful act under Article 1365 of the Indonesian Civil Code if such disclosure causes legal harm (Kennedy, 2025). At the same time, Article 322 of the Criminal Code potentially applies to disclosure of secrets connected to occupational functions. Furthermore, notaries may remain burdened with supervisory liability under Article 1367 of the Civil Code when witnesses involved are employees under their authority. This creates disproportionate liability because notaries may bear legal consequences even where disclosure originates from witnesses (Hans & Gunadi, 2025).

The theoretical framework used in this study is based on the theory of legal certainty, the doctrine of professional confidentiality, and the doctrine of civil liability for unlawful acts. Legal certainty theory is used to analyze whether the absence of witness confidentiality regulation creates normative uncertainty in authentic deed protection. The doctrine of confidentiality

explains the juridical basis of secrecy in notarial functions, while civil liability doctrine is used to assess how responsibility may still arise despite normative silence.

The novelty of this study lies in its specific examination of instrumentary witnesses as independent legal actors within the confidentiality regime of authentic deeds, rather than merely as formal procedural complements in deed formation. This research also constructs an integrated legal analysis by connecting notarial law, civil liability, criminal secrecy provisions, and personal data protection law under Law Number 27 of 2022 concerning Personal Data Protection. Unlike previous studies, this research explicitly formulates the legal consequences of normative silence regarding witness confidentiality and proposes proportional redistribution of legal responsibility between notaries and witnesses.

This research is important to conduct now because the increasing use of authentic deeds in civil, business, inheritance, and personal data-related transactions intensifies the risk of unauthorized disclosure of confidential legal information. The enactment of personal data protection law further strengthens the urgency to clarify confidentiality obligations for all parties involved in deed formation. Therefore, this study aims to analyze the normative gap concerning confidentiality obligations of instrumentary witnesses, examine their legal responsibility in cases of disclosure, and determine the proportional limits of notary liability under Indonesian positive law. The research questions are as follows: How is the regulation of confidentiality obligations of notaries and instrumenter witnesses in the Notary Position Law, and where is the normative gap regarding confidentiality by witnesses?. What is the form of legal responsibility of instrumenter witnesses in maintaining deed confidentiality from the perspective of unlawful acts amid the normative gap in the Notary Position Law?. What are the limits and proportions of notary liability for disclosure of deed information by instrumenter witnesses in the perspective of normative legal gaps?

2. Method

This study employs normative legal research (normative legal research) aimed at analyzing the juridical construction of the normative gap concerning the confidentiality obligations of instrumentary witnesses and its implications for notary liability in Indonesian notarial practice (Sukmawan & Damayanti, 2025). Normative legal research is considered the most appropriate method because the core issue examined in this study concerns the absence of explicit legal norms governing witness confidentiality within the positive legal framework, requiring doctrinal examination of statutory coherence, normative consistency, and legal responsibility construction rather than empirical measurement. This research is oriented toward the analysis of positive legal norms regulating confidentiality obligations in the making of authentic deeds, particularly concerning the legal relationship between notaries and witnesses under the Law on Notary Position (Abdurrahim, Achmad Baihaqi, 2019).

This study applies a statutory approach and a conceptual approach as the principal analytical approaches. The statutory approach is used to examine the hierarchy, consistency, and interrelation of relevant legal norms governing deed confidentiality and legal responsibility. The legal materials analyzed include Law Number 30 of 2004 concerning Notary Position as amended by Law Number 2 of 2014, particularly Article 16 paragraph (1) letter e concerning notarial confidentiality obligations, as well as Article 38 and Article 40 regulating witness existence and formal requirements in authentic deed formation. The statutory analysis also includes Article 1365 of the Indonesian Civil Code regarding unlawful acts, Article 1367 of the Indonesian Civil Code regarding supervisory liability, and Article 322 of the Criminal Code concerning disclosure of professional secrets.

The conceptual approach is employed to examine legal doctrines related to confidentiality, professional secrecy, legal responsibility, and legal certainty in notarial functions (Randomis, 2025). This approach is necessary because the legal problem under examination is not fully regulated in statutory provisions and therefore requires doctrinal construction to explain the

legal consequences of normative silence. In addition, this study integrates the concept of personal data protection under Law Number 27 of 2022 concerning Personal Data Protection to assess the expanding legal relevance of confidentiality obligations in authentic deed practice.

A comparative approach is not applied because the primary objective of this study is not to compare legal systems across jurisdictions but to identify internal normative inconsistency within Indonesian positive law. Likewise, a case approach is not positioned as the main method because the legal issue analyzed concerns normative incompleteness at the statutory level rather than judicial divergence in specific court decisions. Nevertheless, practical legal phenomena regarding potential disclosure by instrumentary witnesses are used illustratively to support doctrinal argumentation concerning the urgency of regulatory reform.

The analytical process is conducted through qualitative legal analysis using three stages. First, legal materials are selected based on relevance to confidentiality obligations, witness participation, unlawful acts, supervisory liability, and legal secrecy. Primary legal materials consist of statutory regulations directly governing notarial practice and civil-criminal responsibility; secondary legal materials include legal literature, scientific journal articles, and expert opinions; while tertiary legal materials consist of legal dictionaries and encyclopedias used to clarify doctrinal terminology (Sulung & Muspawi, 2024). The legal sources are validated through relevance, authority, and normative consistency with the hierarchy of Indonesian legislation.

Second, legal interpretation is carried out through systematic interpretation, by examining the relationship between norms within the same legal framework and across related legal instruments. Article 16 of the Notary Position Law is interpreted systematically together with Articles 38 and 40 to assess whether witness participation logically implies confidentiality obligations despite the absence of explicit wording. This interpretation is further connected to Articles 1365 and 1367 of the Civil Code and Article 322 of the Criminal Code to determine whether general legal responsibility may fill the normative gap.

Third, legal argumentation is constructed using a prescriptive-analytical framework, namely by identifying legal inconsistency, examining normative consequences, and formulating legal recommendations. The existence of a normative gap is assessed through three indicators: absence of explicit norm, existence of legal function requiring regulation, and emergence of disproportionate legal consequences in practice. Through this framework, the study evaluates whether the silence of the Notary Position Law concerning instrumentary witness confidentiality creates legal uncertainty and imbalance in responsibility distribution.

This research is therefore prescriptive-analytical in nature because it not only explains the current normative condition but also formulates legal arguments concerning the need to reconstruct confidentiality obligations for instrumentary witnesses in order to strengthen legal certainty and proportional liability within Indonesian notarial law.

3. Analysis and Results

3.1. Confidentiality Obligations of Notaries and Witnesses Based on the Law on Notary Position

A notary as a public official has the authority to provide legal certainty and protection in the realm of civil law through the making of authentic deeds. In carrying out this function, there is a fundamental principle that cannot be separated from the notary, namely the obligation to maintain the confidentiality of all information obtained during the performance of their duties. This principle of confidentiality is part of the professional code of ethics and legal obligation which is regulated in Law Number 30 of 2004 concerning Notary Position as amended by Law Number 2 of 2014 (Syarifudin, 2022). This obligation has binding force both juridically and morally. Its existence aims to protect the interests of parties who entrust their important information to the notary.

Normatively, the obligation to maintain confidentiality is regulated in Article 16 paragraph (1) letter e of the Law on Notary Position which states that a notary is obliged to keep confidential everything related to the deed he/she makes, including all information obtained in the process of its preparation, unless otherwise stipulated by law (Habib & Agustini, 2022). This provision means that a notary is legally bound not to disclose the contents of the deed or information of the parties without a valid legal basis. Exceptions are only possible under certain conditions, such as in judicial proceedings or requests from law enforcement officials in accordance with applicable provisions. This obligation is absolute but remains open to lawful exceptions. This regulation reinforces that confidentiality is part of the notary's oath of office in maintaining the integrity of legal information.

However, in the implementation of making authentic deeds, not only notaries are directly involved in the process. Based on the provisions of Article 38 and Article 40 of the Law on Notary Position, the presence of witnesses is a formal requirement that must be fulfilled for the deed to have the power as an authentic evidentiary instrument (Purnayasa, 2019). These witnesses are known as instrumentary witnesses who function to witness the reading and signing of the deed by the parties before the notary. The presence of these witnesses serves to support the formal validity of a deed. The Law on Notary Position has regulated in detail the requirements that must be fulfilled by witnesses, such as age limits, legal capacity, ability to understand the contents of the deed, and not having certain relationships with the notary or the parties. The identity of the witness must be included in the deed as part of legal formalities.

In daily practice, instrumentary witnesses generally come from employees of the notary's office itself (Rahmadany & Subekti, 2024). This is done with considerations of efficiency and ease in administrative implementation, because employees are considered to understand the procedures for making deeds. The use of employees as witnesses is considered more practical and minimizes technical obstacles. However, this practice raises legal issues that have not been regulated holistically. The involvement of employees as witnesses gives them direct access to the contents of deeds that are confidential in nature. This condition opens the possibility of misuse of information if it is not balanced with clear regulations.

The problem lies in the absence of explicit regulation in the Law on Notary Position regarding the obligation of witnesses to maintain the confidentiality of the contents of the deed. In contrast to notaries who are explicitly burdened with such obligations, witnesses do not have a legal basis that directly regulates their confidentiality responsibility. This condition creates a vacuum of legal norms that has the potential to cause uncertainty. If there is a leakage of information by witnesses, there is no clear accountability procedure within the framework of the Law on Notary Position. This can harm the parties listed in the deed and weaken legal protection for the confidentiality of the deed.

From a critical legal perspective, this situation indicates a structural weakness in the Law on Notary Position (UUJN), because the law regulates the procedural presence of instrumentary witnesses but does not regulate their corresponding legal obligations regarding confidentiality (Rindiana, 2025; Soetopo, 2024). This asymmetry shows that the UUJN only emphasizes the formal validity of authentic deeds while neglecting the legal risks arising from witness access to confidential legal information. Such regulatory design creates an imbalance between procedural requirements and responsibility norms, thereby revealing a normative deficiency within the statutory framework itself rather than merely an issue of legal interpretation.

3.2. Responsibility of Instrumentary Witnesses in Maintaining Deed Confidentiality and Its Correlation with the Vacuum of Norms

Instrumentary witnesses in the making of authentic deeds have an administrative function as a complement to formal and substantive requirements in maintaining the integrity of the legal process, including the confidentiality of the contents of the deed. In this case, the involvement of witnesses cannot be seen as a passive role, but rather witnesses who are present and sign the deed directly know the contents of the document which are confidential in nature. Morally and

legally, witnesses should also be responsible for maintaining such confidentiality. Due to the absence of explicit regulation in the Law on Notary Position, this responsibility becomes unclear.

If an instrumentary witness discloses the contents of the deed to unauthorized parties, such action can be qualified as an unlawful act as regulated in Article 1365 of the Civil Code (Abdul, Jalal Sri Endah, 2021). This article states that every unlawful act that causes loss obliges the perpetrator to compensate for the damage. Although it is not specifically regulated in the Law on Notary Position, the responsibility of witnesses can still be constructed through the civil law regime. This shows that a vacuum of norms in one regulation does not automatically eliminate legal responsibility. Furthermore, this responsibility can be traced through other legal provisions.

To show this legal problem, a hypothetical case may be constructed. For example, a notary prepares an authentic deed concerning a business partnership agreement between two parties containing confidential financial arrangements. During the drafting process, an instrumentary witness who is an employee of the notary office reads the contents of the deed during the reading session. After the deed is signed, the witness later discloses information regarding the financial structure of the agreement to a third party who competes with one of the contracting parties. As a consequence, the injured party suffers economic loss due to the disclosure of confidential information. In this situation, the elements of an unlawful act under Article 1365 of the Civil Code can be analyzed.

To determine whether an act can be categorized as an unlawful act, certain elements must be fulfilled, namely the existence of an act contrary to law, the existence of damage, the existence of fault, and the existence of a causal relationship between the act and the damage (Suhardin, 2025). In the hypothetical scenario above, the act of disclosing deed information constitutes conduct contrary to law because it violates the principle of confidentiality inherent in authentic deed formation. The injured party experiences material loss due to the disclosure of confidential financial information. Fault may arise either through intentional disclosure or negligence in safeguarding confidential information. Furthermore, the causal relationship between the witness's disclosure and the resulting economic loss can be established because the leaked information directly enabled the third party to exploit the confidential business arrangement.

The losses caused by the disclosure of information by witnesses can be material or immaterial (Vicky *et al.*, 2024). Material losses may include financial losses or loss of economic opportunities, while immaterial losses may include damage to reputation or loss of trust. If it can be proven that this loss is a direct result of the witness's actions, then the element of causality is also fulfilled. This shows that disclosure of information is not only an ethical violation but also has real legal consequences.

The element of fault in the actions of witnesses can be in the form of intent or negligence. Intent occurs when the witness consciously discloses confidential information, while negligence occurs when the witness is not careful in maintaining information. Both forms of fault can still give rise to legal responsibility. The absence of justification or excuse strengthens the position of fault. The disclosure of secrets without rights has long been recognized as a form of legal violation. The actions of witnesses who disclose the contents of deeds can be held accountable under civil law. Although the Law on Notary Position does not explicitly regulate the obligations of witnesses, legal responsibility can still be imposed through the concept of unlawful acts. This shows that a vacuum of norms does not mean the absence of responsibility, but rather the existence of gaps in regulation that need to be improved. The position of witnesses still has juridical consequences due to their involvement in the process of making deeds.

3.3. Notary Liability for Information Leakage in the Perspective of the Vacuum of Norms

The obligation of a notary to maintain the confidentiality of the contents of a deed is contained in the oath of office which is binding both morally and legally (Putri & Marlyna, 2021). A notary is obliged to maintain all information obtained in the performance of their duties, both related to the contents of the deed and the data of the parties. The purpose of this obligation is to provide legal protection and ensure public trust in the notary profession. Violation of this obligation may result in administrative sanctions.

In practice, information leakage does not always originate from the notary but may come from instrumentary witnesses who are also involved in the process of making the deed. This raises the issue of the limits of notary responsibility, especially in conditions where the leakage is carried out by other parties. Nevertheless, the notary is still considered the responsible party. This is due to their position as the official who controls the process of making the deed. This condition shows an imbalance of responsibility due to the vacuum of norms related to witnesses.

Based on criminal law, the disclosure of professional secrets is regulated in Article 322 of the Criminal Code which prohibits any person from disclosing secrets that must be kept due to their position or work. This article can be applied if there is an element of intent in the disclosure of information. Enforcement of this article depends on a complaint from the injured party. If the notary is proven negligent in maintaining the information security system, then they can be held accountable. Notary responsibility is both direct and indirect.

Furthermore, notaries may be subject to administrative and civil sanctions. Sanctions may range from warnings to dismissal from office. In civil law, notaries may be required to compensate if proven negligent. This shows that notary responsibility is holistic. However, when the leakage originates from witnesses, imposing full responsibility on the notary becomes disproportionate (Imran & Jatmikowati, 2025; Juliani, 2025; Kalkhove et al., 2023; Lectio et al., 2025; Silalahi & Sudiro, 2025; Wahyu et al., 2026).

From the perspective of liability distribution theory, responsibility should be allocated proportionally to the parties who have effective control over the harmful act. In this context, the doctrine of fault-based liability within civil law indicates that the party committing the unlawful act should bear primary responsibility, while supervisory liability should only arise when there is negligence in supervision. Therefore, automatically transferring the entire burden of liability to the notary without recognizing the independent actions of instrumentary witnesses contradicts the principle of proportional liability in civil responsibility doctrine.

This condition again shows the weakness in existing legal regulations. The vacuum of norms regarding witness obligations increases the burden of notary responsibility. Notaries are responsible for their actions and potentially bear the consequences of the actions of others. This creates injustice in the distribution of legal responsibility. This is the urgency for the need for clearer regulations to distribute responsibility proportionally. Thus, notary liability for information leakage must be viewed proportionally by considering the role of other parties, especially instrumentary witnesses.

4. Conclusion

The obligation to maintain the confidentiality of deeds is a fundamental principle in notarial practice imposed on notaries based on the provisions of the Law on Notary Position, however, it is not followed by explicit regulation regarding instrumentary witnesses who are also involved in the process of making deeds. This situation creates a vacuum of legal norms which results in an imbalance of responsibility, where the notary continues to bear the full burden of confidentiality of the deed even though the potential leakage of information may originate from witnesses. Nevertheless, instrumentary witnesses can still be held legally accountable through the construction of unlawful acts based on Article 1365 of the Civil Code if they are proven to

have disclosed information that causes losses, whether material or immaterial, and fulfills the elements of fault and causal relationship. Notaries may also potentially be held accountable, whether administratively, civilly, or criminally, if they are deemed negligent in maintaining information security or in supervising the parties involved. This shows that a vacuum of norms does not eliminate legal responsibility but instead creates uncertainty and injustice in the distribution of the burden of responsibility. Therefore, a reformulation of regulations governing the confidentiality obligations of instrumentary witnesses is needed in order to create legal certainty, protection for the parties, and a balanced distribution of responsibility. Theoretically, this study strengthens the development of notarial liability doctrine by showing that confidentiality obligations in authentic deed practice cannot be interpreted exclusively as a personal obligation of notaries, but must also be understood within the framework of proportional liability distribution among all actors participating in deed formation. Practically, the findings provide guidance for notaries to strengthen internal supervision mechanisms, confidentiality agreements, and administrative controls over office employees acting as instrumentary witnesses. From a policy perspective, this study indicates the urgency of revising the Law on Notary Position by expressly regulating confidentiality duties and legal consequences for instrumentary witnesses in order to eliminate normative ambiguity and improve legal certainty in notarial services.

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