

The Notary's Responsibility Regarding Deliberate Dishonesty Actions

Andyna Susiawati Achmad^{ID}

Faculty of Law, Universitas Pelita Harapan, Surabaya, Indonesia
andyna.susiawati@gmail.com

Astrid Athina Indradewi^{ID}

Faculty of Law, Universitas Pelita Harapan, Surabaya, Indonesia
astridathina@hotmail.com

Abstract

A notary is a public official who performs his or her position based on the authority given to him or her by the law. A notary declares and states the wishes of all parties in the authentic deed according to his or her legal knowledge. Prior to that, a notary has to make sure the deed does not violate the law, public order, or morality. One of the common problems with notarial deeds is when false statements are found in an authentic deed. The inclusion of false statements above into an authentic deed is a crime that is covered by Article 263 Paragraph (1) juncto Paragraph 264 Paragraph (1) of the Indonesian Criminal Law. This research is normative juridical research with a statutory approach and conceptual approach. The conclusion of this research is most of the false statements found in authentic deeds came from the parties interested in the deed; however, this does not mean a notary cannot be involved. Criminal law seeks material truth, and material truth cannot be assumed that the notary has only reiterated the wishes of the involved parties. The Notary may make two kinds of mistakes, intentionally or negligently. Therefore, it is necessary to distinguish between deliberate dishonesty and malpractice in notaries during their duties. A notary who intentionally submits false information to their deed the measures it called an act of deliberate dishonesty

KEYWORDS *Notary Law, Authentic Deed, Deliberate Dishonesty, Malpractice*



Copyrights © Author(s). This work is licensed under a Creative Commons Attribution-NonCommercial 4.0 International License (CC BY-NC 4.0). All writings published in this journal are personal views of the author and do not represent the views of this journal and the author's affiliated institutions.

Introduction

The important presence of notaries in society cannot be separated from their duty and authority. Their function is to create authentic deeds and fulfill any other legal duties based on the official oath of the notary and notary law. The law stipulated that notary is a noble position and expected to keep their dignity as public officials.¹ The philosophy of appointing a notary public officer is to provide legal certainty, order, and legal protection for every citizen who uses their services.² Based on Law No. 30 the Year 2004 regarding Notary Public, State Gazette of the Republic of Indonesia Year 2014 No. 117, Supplement to State Gazette of the Republic of Indonesia No. 4432 (hereinafter referred to Law No. 30 the Year 2004), as amended by Law No. 2 the Year 2014 regarding Amendments to Law No. 30 the Year 2004 regarding Notary Public, State Gazette of the Republic of Indonesia of 2014 Number Supplement to State Gazette of the Republic of Indonesia Number 5491 (hereinafter referred to as UUJN), the law regulates such authority given to notaries to creates such authentic deeds. Article 1 paragraph (1) of UUJN stipulates that a "Notary is a public official authorized to make authentic deed and has other authority as referred to in law this or under any other law". Article 15 paragraph (1) of UUJN stated, "Notary public is authorized to make an authentic deed of all the deeds of the treaty, and the provisions required by legislation and/or desired by the interested parties to be stated in the authentic deed, date of making of the deed, saving the deed, giving Grosse, copy and quotation of the deed, all of which during the making of the deeds are not also assigned or exempted to other official or another person as stipulated by law."

The appointment and dismissal of a Notary carried out by the

¹ Winanto Wiryomartani, "Notary Malpractice in Carrying Out Their Duties and Authorities," *Global Legal Review* 1, no. 2 (2021): 143.

² Simon Nahak, "The Liability of Criminal Law towards a Notary Official in the Crime of Embezzlement at the Denpasar District Court," *NOTARIIL Jurnal Kenotariatan* 5, no. 2 (2020): 107–17.

government, in this case, the Minister whose duties and responsibilities cover the notary area, then the requirements of the General Officer is a person appointed by the government with the task of authority to provide public services in certain fields, fulfilled by the Notary Position.³ Notary in carrying out their position as Acting Notary Protocol is regulated in Article 1 number (13) of UUJN, is a collection of documents that are state archives, which must be kept and maintained by a notary by statutory regulations, as furtherly explained in Article 62 of the UUJN.⁴

In fulfilling their duty, notaries must comply with the concept of *Verlijden*, which means compiling, reading, and signing deeds. G. H. S. Lumban Tobing stated that *Verlijden*'s concept is the process of producing a deed in the form determined by law.⁵ Thus, through this explanation, notaries in carrying out their duties do not mean to create authentic deeds on the will of the appeared alone, but must also adhere to the laws and regulations. Notaries have a legal obligation to adjust the wishes of the parties in relevant regulations. Notary also provides advice and explanations regarding the law to the related parties.⁶ Furthermore, they also have the authority to refuse to make a deed on the condition that the parties' desire is contrary to or violated the law. Notaries in carrying out their duties cannot be separated from their responsibilities, both morally and legally. Notaries may be responsible for civil, administrative, and criminal liability.⁷ Habib Adjie, in their dissertation entitled "Civil and Administrative Sanctions Against Notaries as Public Officials Relating to

³ Dewi Padusi Daeng Muri, Galang Prayogo, and Faisal Arif, "The Rights and Obligations of Notaries According to Indonesian Law Concerning Notary Position," *International Journal of Mechanical Engineering and Technology* 9, no. 8 (2018): 875–81.

⁴ Megacaesa Fuditia, Ni Made Srinetri, and Anis Mashdurohatun, "Legal Protection Of Notary Recipients Of The Protocol For Deeds Which Allegedly Is Related To Legal Problems In Semarang City," *Jurnal Akta* 7, no. 2 (2020): 117.

⁵ G.H.S. Lumban Tobing, *Peraturan Jabatan Notaris* (Jakarta: Gelora Aksara Pratama, 1982), 32.

⁶ Muri, Prayogo, and Arif, "The Rights and Obligations of Notaries According to Indonesian Law Concerning Notary Position."

⁷ Kartini Siahaan, "Kedudukan Hukum Akta Notaris Sebagai Alat Bukti Pada Tindak Pidana Pemalsuan Surat Dalam Proses Peradilan Pidana," *Recital Review* 1, no. 2 (2019): 72–88.

Making Deeds Based on the Law on Notary Positions" emphasized that notaries can be held accountable in carrying out their duties.⁸ Habib Adjie explained civil sanctions and administrative sanctions that can be imposed on notaries.

UUJN regulates the forms of civil law consequences for violations committed by a notary, starting from the consequences of decreasing the degree of the deed to be equal to the strength of the proof of the deed under the hand to things that can have implications for the notary accountability. Article 16 paragraph (9) of UUJN stipulates that if there is a notary violation related to the deed's witness, the deed's reading can cause the deed to be lowered. Article 16 paragraph (12) of UUJN opens up opportunities for liability by a notary when a notary commits negligence related to the administrative reporting of a will. Article 16 paragraph (12) of UUJN stipulates that "violation of the provisions of Article 16 paragraph (1) letter j can be a reason for the party suffering losses to claim reimbursement of costs, compensation and interest from a Notary". The same thing is also contained in Article 44 paragraph (5) of UUJN with the consequence of decreasing the degree of the deed if one violates the obligation to read the deed. Many other articles bring the implications of the deed made by a notary to be downgraded. One of the impacts of the downgrade of a notary deed is that the parties harmed because of this can ask for accountability from the notary. As regulated in Article 84 of UUJN in general, when a notary causes harm to parties related to a violation of the obligation - the parties can sue the notary for such compensation.

In its development, many cases in practice give rise to criminal issues related to notarial deeds. There is a potential intersection of notary duties with violations under criminal law.⁹ A notary carrying out their or

⁸ Habib Adjie, "Sanksi Perdata Dan Administratif Terhadap Notaris Sebagai Pejabat Publik Berkaitan Dengan Pembuatan Akta Berdasarkan Undang-Undang Jabatan Notaris" (Disertasi, Program Doktor Fakultas Hukum Universitas Airlangga, Surabaya, 2007).

⁹ Entin Sholikhah and Jawade Hafidz, "Perlindungan Hukum Terhadap Jabatan Notaris Yang Diduga Melakukan Malpraktek Dalam Proses Pembuatan Akta Otentik," *Jurnal Akta* 4, no. 1 (2017): 47-50.

her duties is violating the provisions of criminal law will be held accountable based on the provisions of general criminal law, namely through the articles contained in the Criminal Code. Notaries in carrying out their duties lately have been in contact with many criminal cases, especially notaries who have been suspected or charged with, even convicted of crimes of forgery of letters¹⁰ as regulated in Article 263 paragraph (1) of Criminal Code, Article 264 paragraph (1) of Criminal Code, and Article 266 paragraph (1) of Criminal Code. Generally, notaries are charged with the appearing client under the provisions of articles related to the crime of forgery of letters, forgery of authentic deeds, or categorized as co-actors who committed acts by Article 55 paragraph (1) of the Criminal Code.

This research is related and developed to previous research. A research paper was done by Valentine Phebe Mowoka in 2014, titled "The Implementation of Notary's Responsibility for the created Deed".¹¹ Based on the research conclusion shows the duties and responsibilities of a notary is related to the deed, legal actions, and stipulations that created the right and obligation of the parties. It also aims to help the society that needs authentic written evidence. The legal consequence of a counterfeit deed is null and void as the notary did not fulfill the requirement objectively and subjectively. The other related research was done by Kunni Afifah in 2017, titled "The Responsibility and Legal Protection of Notary for the created Deed based on Civil Law".¹² The results indicate that a civil liability of a Notary who committed an unlawful act is the Notary shall account for his actions with civil sanctions in the form of reimbursement or compensation to the injured party on an unlawful act committed by a Notary. The notary's responsibility in the case of false information in the deed still needs to be

¹⁰ Teresia Din, "Pertanggungjawaban Notaris Terhadap Akta Otentik Terindikasi Tindak Pidana," *Jurnal Penelitian Hukum De Jure* 19, no. 2 (2019): 171–83.

¹¹ Valentine Phebe Mowoka, "Pelaksanaan Tanggung Jawab Notaris Terhadap Akta Yang Dibuatnya," *Lex Et Societatis* 2, no. 4 (2014).

¹² Kunni Afifah, "Tanggung Jawab Dan Perlindungan Hukum Bagi Notaris Secara Perdata Terhadap Akta Yang Dibuatnya," *Lex Renaissance* 2, no. 1 (2017): 10.

investigated further, namely what limits can be used as a reference for a notary to be declared involved or not with the crime, for that it is necessary first to carefully examine what kinds of violations notary in carrying out their duties.¹³ Hence, it will declare the appropriate concept to use to hold a notary accountable in the capacity of their position, whose primary function is actually to make the will of the parties' constant into an authentic deed. The element of intent and negligence on the part of a notary is the main key to placing a notary responsible or not. For this reason, it is necessary to examine the concept of malpractice and deliberate dishonesty in carrying out the duties of a notary. Based on this explanation, the formulation of the problem is presented: What is the basic concept of a Notary's responsibility in carrying out their duties?

Method

This research is normative juridical research. This type of research will follow the nature of legal science, i.e., prescriptive and applied. The approach used in this legal research was a statutory approach and a conceptual approach. The statutory approach was carried out by starting to collect laws and regulations relating to notaries and criminal laws and regulations. The conceptual approach departs from the concept of notary error, intentional or negligence, and notary responsibility, followed by the concept of criminal responsibility, the concept of the crime of forgery of letters, and the crime of participation. The legal materials used were primary legal materials and secondary legal materials. Primary legal materials are legal materials that are binding in nature, in the form of statutory regulations related to notaries and criminal acts, while secondary legal materials are closely related to primary legal materials because they

¹³ Fabryan Nur Muhammad, Yeni Widowaty, and Trisno Raharjo, "Penerapan Sanksi Pidana Terhadap Pemalsuan Akta Otentik Yang Dilakukan Oleh Notaris," *Media of Law and Sharia* 1, no. 1 (2019): 1–13.

explain and reinforce primary legal materials, consisting of the opinions of scholars, doctrines, and expert opinions in various literature, related textbooks, legal journals, and various other official documents.

Result and Discussions

Procedures for the Implementation of Notary Duties related to the Deed Making Process according to UUJN

An authentic deed based on Article 1868 Burgerlijk Wetboek (hereinafter referred to as BW) is a deed in the form determined by law, drawn up by or in the presence of public officials in power for that purpose at the place where the deed was made. Under Article 1870 BW, an authentic deed provides the parties and their heirs and those who have rights from them with perfect evidence of what is contained therein. The important difference between an underhand deed and an authentic deed is that an authentic deed has perfect proving power. The perfection of the notarial deed as evidence, then the deed must be seen as it is. It does not need to be assessed or interpreted differently other than what is written in the deed.¹⁴

Based on C.A. Kraan on their dissertation report, *De Authentieke Akte*, the characteristics of authentic deeds are:¹⁵

- 1) A writing is intentionally made solely to be used as evidence or proof of the circumstances as stated in the writing made and stated by the competent authority. The writing is also signed by the presenters or only signed by the official concerned.
- 2) A writing until there is evidence to the contrary, is deemed to have come from an authorized official.

¹⁴ M. Alie Boediarto, *Komplikasi Kaidah Putusan Mahkamah Agung, Hukum Acara Perdata Setengah Abad, Swa Justitia*, Jakarta, 2005, page 150 in Adjie, "Sanksi Perdata Dan Administratif Terhadap Notaris Sebagai Pejabat Publik Berkaitan Dengan Pembuatan Akta Berdasarkan Undang-Undang Jabatan Notaris," 48.

¹⁵ C.A. Kraan, *De Authentieke Akte*, Guoda Qiu BV, Arnhem, 1984, 1981, h. 143 & 201 dalam Herlien Bodiono, *Kumpulan Tulisan Hukum Perdata Di Bidang Kenotariatan* (Bandung: Citra Aditya Bakti, 2008), 214–15.

- 3) The statutory provisions that must be met; the provisions regulate the procedure for its manufacture (at least contain provisions regarding the date, place where a written deed was made, the name and position of the official who made it), the data where it can be known about these things.
- 4) An official who is appointed by the state and has characteristics and work that is independent (*onafhankelijk-independence*) and impartial (*onpartijdig-impartial*) in carrying out their position in accordance with the provisions of Article 1868 BW *juncto*. Article 1 PJN which is now changed to Article 15 paragraph (1) UUJN.
- 5) Statements of facts or actions mentioned by officials are legal relations in the field of private law.

Objections to the truth of the contents of the deed made by a notary must be proven by the party who submits the objection, while the party holding the deed is not obliged to prove the truth of the deed they made. The deed made by a notary is an authentic deed, and its authenticity persists, even after they die. their signature on the deed still has power, even though they can no longer convey information about the events at the time of making the deed.¹⁶ Regarding the authenticity of the notary deed, the state provides certain requirements.

If a deed wishes to obtain a stamp of authenticity, which is contained in a notarial deed, then according to Article 1868 BW, the deed in question must meet the following requirements:¹⁷

1. The deed must be made “by” (*door*) or “in the presence of” (*tenoverstaan*) a public official;

Based on the provisions of Article 1 paragraph (1) of UUJN, and Article 15 paragraph (1) of UUJN, then concerning notarial deeds regarding deeds, agreements, and stipulations, one of the public officials referred to in Article 1867 here is a notary.

2. The deed must be made in the form determined by law;

¹⁶ Nico, *Tanggungjawab Notaris Selaku Pejabat Umum* (Yogyakarta: CDSBL, 2003), 48–49.

¹⁷ Habib Adjie, *Meneropong Khazanah Notaris Dan PPAT Di Indonesia (Kumpulan Tulisan Tentang Notaris Dan PPAT)* (Bandung: Citra Aditya Bakti, 2009), 13–14.

If it is related to a notary deed, it means that it is subject to the requirements for the form of a notarial deed as regulated in Article 38 of UUJN, as well as other requirements that are specifically specified in each law relating to legal actions in the deed.

3. The public official by or before whom the deed was made, must have the authority to make the deed;

This authority relates to the authority of a notary as regulated in Article 15 of the UUJN and regarding the authority of the domicile and area of the office of a notary as regulated in Article 18 of the UUJN. This includes all other powers granted by the laws and regulations to a notary. Some limits can determine whether or not a notary is authorized to make the deed.

The notary is an office of trust.¹⁸ This implies that those who stint trustworthy positions and their office as a notary office of trust so that the office of notary positions of trust and people who run the office tasks can also believe that the two are mutually supportive. Therefore, notaries who run their office must conceal everything about the deed made and all information obtained for a deed by the oath or pledge of the office unless the law determines the other as stipulated under UUJN.¹⁹

Chapter III of UUJN regulates the authorities, obligations, and prohibitions for notaries. Article 15 paragraphs (1), (2), and (3) of UUJN regulates the authority of a notary. Article 15 paragraph (1) UUJN stipulates that: "Notaries are authorized to make Authentic Deeds regarding all actions, agreements, and provisions required by laws and/or desired by interested parties to be stated in authentic deeds, guarantee certainty of the date of making the deed, keep the deed, provide Grosse, copies, and quotations. deed, all of that as long as the making of the deeds is not assigned or excluded to other officials or other people stipulated by law."

¹⁸ Rahmad Hendra, "Tanggungjawab Notaris Terhadap Akta Otentik Yang Penghadapnya Mempergunakan Identitas Palsu Di Kota Pekanbaru," *Jurnal Ilmu Hukum* 3, no. 1 (2012).

¹⁹ Djuniatno Hasan, Agus Ekhsan, and Gunarto Gunarto, "Implementation of Legal Protection of Confidential Obligation Notary In Running Position," *Jurnal Akta* 7, no. 2 (2020): 223–28.

The authority as regulated in Article 15 paragraph (1) of UUJN is the main authority possessed by a notary. The state trusts notaries to make authentic deeds. Authentic deeds were made by a notary, including all things unless specifically stipulated otherwise by law.

The process of making a notarial deed consists of several stages. At the initial stage, before making the deed, the notary must assess the skills or authority of the appearers/parties who come to him. Article 39 of UUJN requires the appeared to be at least 18 (eighteen) years old or married and capable of carrying out legal actions. Then the interested parties state their aims and objectives. The notary must be able to see the intent and purpose of the parties to make the deed.²⁰ From this point, the function of the notary is very important. This function is related to the authority of a notary as a provider of legal counseling.

The second stage of making a notarial deed is that the notary asks for all the completeness of documents related to legal actions in the deed. The document includes the original document and the photocopy of it. After everything is completed, the notary will prepare the minutes of the deed. The minutes of the deed that are by the aims and objectives of the parties are immediately processed by a notary by the requirements in the UUJN. Processing of this deed begins by presenting the witnesses of the deed, reading it by a notary, and the possibility of correction. After being well received by all parties related to the deed, the minutes of the deed will be signed and/or affixed with a thumbprint successively by the appearers, witnesses, and notaries.²¹ This is regulated in Article 44 paragraph (1) of the UUJN, namely: "Immediately after the Deed is read, the Deed is signed by each appeared, witness, and Notary, unless there are appearers who are unable to sign and state the reasons".

The last stage of this whole process is for the notary to save the minutes of the deed that was made earlier because the minutes of the deed is part of

²⁰ A.A. Andi Prajitno, *Pengetahuan Praktis Tentang Apa Dan Siapa Notaris Di Indonesia?* (Surabaya: Putra Media Nusantara, 2010), 61.

²¹ *Ibid.*, 62.

the notary protocol, which is a state document. This is by the provisions in Article 16 paragraph (1) letter b of the UUJN. Keeping these minutes is a crucial obligation carried out by a notary to ensure the authenticity of the deed. The minutes of the deed kept by the notary will make it easier to match the copy of the deed.

The formal requirements for making a notarial deed are contained in the UUJN, specifically related to the provisions of Article 38 of the UUJN. According to Article 38 paragraph (1) UUJN, it is determined that a notary deed must consist of 3 (three) parts, namely the initial part of the deed or the head of the deed; the body of the deed; and the end or closing of the deed. Furthermore, Article 38 paragraph (2) to paragraph (4) of UUJN provides further elaboration of what things must be in each part of the deed:

- 1) the head of the deed must consist of:
 - a) the deed's title;
 - b) the number of the deed;
 - c) hour, day, date, month, and year;
 - d) and the full name of the public notary and notary's domicile.
- 2) the body of the deed
 - a) The full name, place, and date of birth, nationality, occupation, position, position, place of residence of the appearers and/or the person they represent;
 - b) Information regarding the position of acting against;
 - c) The contents of the deed are the will and desire of the interested parties; and
 - d) Full name, place, and date of birth, as well as occupation, position, position, and residence of each identifying witness.
- 3) the closing of the deed
 - a) A description of the reading of the deed;
 - b) Description of the signatory and the place of signing or translation of the deed, if any;

- c) Full name, place, and date of birth, occupation, position, position, and residence of each witness to the deed; and
- d) A description of the absence of changes that occurred in the making of the deed or a description of any changes which may be in the form of additions, deletions, or replacements.

The formal requirement for a notary deed is that it must fulfill all the provisions of each part of the deed described in Article 38 of the UUJN. Thus, a deed is said to have fulfilled the formal requirements for making a deed if it contains the beginning of the deed, the body of the deed, and the end of the deed, which contains a description of, among others, the date, month, year of making the deed, the contents of the deed, signed by the parties, witnesses and notaries, and confirmation of the reading and signing of the deed.

The material requirements for making a notarial deed are conditions directly related to the legal requirements of an agreement according to law, i.e., fulfilling the provisions of Article 1320 BW.²² Article 1320 BW stipulates that there are 4 (four) conditions for the validity of an agreement:

- 1) consent of the individual who is bound thereby;
- 2) the capacity of the respective parties to conclude obligation;
- 3) a specific legal matter;
- 4) a legal cause.

This material requirement confirms the position of the notary as the contractor of the deed, and the process of making this deed is a *Verlinden* act, namely compiling, reading, and signing the deed, not merely *opmaken* or making a deed.²³ Fundamentally, the material requirements of a notarial deed can be fulfilled by both parties without the intervention of a notary, but because of their position as a deed constituency in the sense of a

²² I Gusti Agung Oka Diatmika et al., "Perlindungan Hukum Terhadap Jabatan Notaris Berkaitan Dengan Adanya Dugaan Malpraktek Dalam Proses Pembuatan Akta Otentik" (Doctoral dissertation, Udayana University, 2014).

²³ Tobing, *Peraturan Jabatan Notaris*, 32.

verlijden deed, the notary must ensure that all the material requirements have been fulfilled perfectly. For example, the notary is obliged to clarify to the parties regarding the agreement they have made, then stabilize what has been explained by the parties about the agreement without having to reduce or add to what was explained by the parties in the deed. Regarding the qualification requirements, the notary must check the skills and authority of the parties to carry out legal actions. The checks carried out by the notary are limited to formal checks. The notary can know this skill and authority based on the information and formal evidence presented by the parties themselves to the notary. Likewise, with the terms of the object of the agreement and the cause of the agreement, the notary needs to clarify or check this with the parties. Notaries carry out checks based on formal evidence, notary scientific knowledge, statements of the parties, as well as through things that can strengthen the formal truth of what is conveyed by the parties. The function of a notary in the concept of a *verlijden* act here is to determine whether everything is by the provisions of the legislation and other related regulations. As long as it has been fulfilled, the notary can immediately make a deed for the parties by constituting matters of deeds, agreements, stipulations, and events into the notarial deed. Fulfillment of all formal and material requirements in the process of making a deed, then formally, according to UUJN, the task of a notary in producing an authentic deed is completed. A deed made by a notary who has fulfilled all the legal requirements of the deed as an authentic deed, then the deed will acquire authenticity until the deed is declared invalid by the judiciary through an *inkracht* judge's decision.²⁴

Malpractice and Deliberate Dishonesty as a Basis for Notary Responsibilities

²⁴ Habib Adjie, *Hukum Notaris Indonesia (Tafsir Tematik Terhadap Undang-Undang Nomor 30 Tahun 2004 Tentang Jabatan Notaris)* (Bandung: Refika Aditama, 2009), 140.

Notaries who carry out their duties as public officials and professionals may make mistakes in the process of making the deed. UUJN and the Notary Code of Ethics have provided standard directions for the deed-making process that a notary must obey. Violation of the standard procedure for making this deed is a form of notary violation which can be said as a form of notary error. This standard of professional standard procedure gave birth to the term professional error, which is generally referred to as an act of malpractice. People who carry out their duties professionally and professionally have standard procedures to recognize malpractice acts in carrying out their professional duties.

The profession uses the term malpractice to describe negligence, irregularities, errors, or inability of professional practice to meet certain standards, which results in harm to service users. Malpractice comes from the term "malpractice" which Coughlin defines as:

“Professional misconduct on the part of a professional person, such as a physician, engineer, lawyer, accountant, dentist, or veterinarian. Malpractice may be the result of ignorance, neglect, or lack of skill or fidelity in the performance of professional duties, intentional wrongdoing, or illegal or unethical practice.”²⁵

Black's Law Dictionary describes malpractice as:

"Professional misconduct or unreasonable lack of skill or failure of one professional rendering services to exercise that degree of skill and learning commonly applied under all the circumstances in the community by the average prudent reputable member of the profession with the result of injury, loss, or damage to the recipient of those services or to those entitled to rely upon them.”²⁶

²⁵ Soerjono Soekanto and Herkutanto, *Pengantar Hukum Kesehatan* (Bandung: Rermadja Karya, 1987), 153.

²⁶ Bryan A. Garner, *Black's Law Dictionary*, ed. St. Paul Minn, 7th ed. (Minnesota: West Group, 1990), 111.

The profession uses the term malpractice to describe an error committed by the professional community that causes the standard service procedure not to be as it should be. The malpractice act can harm certain parties who use the professional services of the profession. Standards of obligation or service standards must be adhered to by a professional; if a professional violates these standards, they can be said to have committed malpractice.

Generally, a professional error is said to be malpractice if it meets the following elements:²⁷

- 1) There is culpability;
- 2) The existence of damages;
- 3) The existence of a causal relationship.

The types of malpractices committed by Notary in carrying out their positions, such as:²⁸

- A Notary makes a deed, but the person does not feel they are coming to the notary. One of the defenders is facing the notary who has their minute deed (the original Deed) to see the signature directly, and the notary does not permit him. The notary only gives the copies of the Deed. The notary does not want to show him the attachment of a copy of the land certificate that becomes the object of the Notary deed.
- The existence of a Notary makes the Deed of sale and purchase of buildings and the release of state land ownership to each party. However, each party has no ownership of the land, a former HGB state land even though it has just ended.

Legally, malpractice is divided into 3 (three) main categories according to the field of law that is violated, namely Criminal Malpractice,

²⁷ Y.A. Triana Ohiwutun, *Bunga Rampai Hukum Kedokteran* (Malang: Banyumedia, 2007), 64.

²⁸ Enriko Silalahi and Akhmad Khisni, "Legal Review Of Malpractice Notary In The Notary's Deed," *Jurnal Akta* 5, no. 3 (2018): 648.

Civil Malpractice, and Administrative Malpractice. The three categories will be explained as follows:²⁹

- 1) Criminal malpractice occurs when an action fulfills the formulation and elements of a criminal offense: The act (positive or negative) is a despicable act; It is carried out with the wrong mental attitude (*mens rea*) in the form of intentional, recklessness or negligence. Criminal malpractice that is intentional, for example, a notary who intentionally participates in falsifying letters by making a deed of resignation that is not by the truth, or the notary has intentionally included false information regarding the identities of the parties. Criminal malpractice that is careless or negligent, for example, one of the obligations of a notary, as in Article 16 paragraph (1) of UUJN, is to read the deed before the parties, but this can deviate when the reading of the deed is not desired by the parties concerned because the parties have read, know and understand the contents of the deed, provided that it is stated in the closing of the deed and on each page of the Minutes of the Deed initialed by the appearers, witnesses, and the notary as referred to in Article 16 paragraph (7) of UUJN. However, the notary failed to state the information in the closing section of the deed. Hence, it was considered an oversight by the notary.
- 2) Civil malpractice occurs when it does not carry out its obligations or does not provide its achievements as agreed (broken promises). Actions that can be categorized as civil malpractice include:
 - a) Not doing what according to the agreement must be done;
 - b) Doing what according to the agreement must be done but too late to do it;
 - c) Doing what according to the agreement must be done but not perfect; and

²⁹ AmaliaTaufani, *Tinjauan Yuridis Malpraktek Medis Dalam Sistem Hukum Indonesia* (Surakarta: Fakultas Hukum Universitas Sebelas Maret, 2011) (see also the written article on access <http://paradipta.blogspot.com/2011/02/malpractice.html>).

- d) Doing what according to the agreement should not be done
- 3) Administrative malpractice occurs when it has violated administrative law. In this case, a notary may be subject to administrative sanctions if they does the following:
- a) Running a notary practice without permission
 - b) Carrying out the practice of a notary that is not by its authority
 - c) Doing a notary practice with an expired permit

According to Liliana Tedjosaputro, in the event of notary malpractice, the notary can also be subject to criminal, civil, and administrative charges.³⁰ If the malpractice is carried out, it turns out that it also violates criminal law, civil law, and administrative law. The scope of malpractice carried out by a notary includes forms of denial or deviation or lack of ability from the duties and responsibilities of a notary either due to an error or due to negligence which can be accounted for by them to carry out professional obligations or based on trust.³¹ This malpractice can occur in the fields of ethics, and law, both criminal, civil, and administrative law.³²

In finding forms of criminal responsibility for notary malpractice related to the procedure for making a deed, notary malpractice must be divided into 2 (two) classifications, i.e., unintentional notary malpractice and deliberate notary malpractice. Malpractice carried out unintentionally occurs due to negligence (which in this case includes negligence is also carelessness, lack of knowledge, lack of experience, and other reasons on the part of the notary who was not intentional by the notary). It is referred to as pure malpractice. Meanwhile, malpractice committed by a notary intentionally is referred to as an act of deliberate dishonesty. In discovering forms of criminal liability for notary malpractice related to the procedure for making a deed, notary malpractice must be divided into 2 (two)

³⁰ Liliana Tedjosaputro, *Etika Profesi Notaris (Dalam Penegakan Hukum Pidana)* (Yogyakarta: BIGRAF Publishing, 1995), 16.

³¹ *Ibid.*, 19.

³² *Ibid.*

classifications, i.e., unintentional notary malpractice and intentional notary malpractice.

An example of malpractice that occurs in the making of a deed is the information regarding the time of signing the deed, which is not following the reality. The deed states that Mr. A appeared before a notary on June 27th, 2015. When in fact, Mr. A confronted and signed the deed on July 2nd, 2015. If the notary deed contains information that does not follow the actual time that occurred at the time of signing the deed, then there has been notary malpractice. It is necessary to prove whether the malpractice is pure malpractice or an act of deliberate dishonesty. UUJN provides an opportunity for a notary to correct an administrative error committed against their deed so that a fatal error, as mentioned in the example above, is suspect, and the material truth must be sought regarding the involvement of a notary together with the appearers to include date information that does not match with reality intentionally. The information given by the notary and the appearance regarding the date of the deed indicates that a crime has occurred, which is related to the criminal act of forging letters as regulated in the Criminal Code. If the malpractice is proven to be pure malpractice without deliberate dishonesty, then the solution to fixing it is through the mechanism regulated in the UUJN. There is no criminal act in it. On the other hand, if it can be proven that the information regarding the date was deliberately made by a notary together with the parties, then it means that there is malpractice containing an act of deliberate dishonesty, which causes the notary to be held criminally responsible for the act because it is a criminal law act. Of course, related to the criminal act, the notary must be able to prove that they has fulfilled all the elements of a criminal act. If they does not meet the elements as specified in the Criminal Code, of course, the notary cannot be punished.

Actions, as mentioned above, are included in the realm of pure malpractice when the information regarding the date of making the deed is carried out by a notary due to negligence in terms of procedures, for

(b) No insurance under paragraph (a) may provide for any payment, other than the cost of defense, to or on behalf of any director or officer:

*(1) if a judgment or other final adjudication adverse to the insured director or officer establishes that their acts of active and **deliberate dishonesty** were material to the cause of action so adjudicated, or that they gained a financial profit or another advantage to which they was not legally entitled, or*

...”

Notary malpractice, classified in the form of deliberate dishonesty, is an act that a notary intentionally carries out to commit an act of violating professional standards or legal norms. In the deliberate dishonesty act, there is a deliberate act of a notary which has implications for other violations of the law which are not only at the level of violation of the code of ethics, as well as the procedure for making a deed but lead to violations of the law, generally violations of criminal law. The involvement of a notary in this action is because it is done intentionally. A notary's error is indeed a deliberate mistake to be able to cause an advantage for himself, their colleagues, or certain benefits that they hopes to occur. Pure malpractice or deliberate dishonesty acts as a consequence of responsibility for the notary.

For every case involving a notary deed, it must involve an expert witness in the field of a notary to provide a clear picture to the judge and the public prosecutor regarding the duties and steps that are obligatory or not obligatory to be carried out by a notary. This is where the function of the notary organization and the notary supervisory board is. Based on Kepmenkumham No. M-01.HT.03.01 of 2003, the only Notary Organization recognized by the Government is the "Ikatan Notaris Indonesia". However, not a single word in the UUJN, both in the articles and in the explanation, states that the notary organization referred to by the UUJN is the Indonesian Notary Association. The acknowledgment from the Ministry of Law and Human Rights that the Indonesian Notary Association is the “single vessel” for Notaries was finally reaffirmed through Permenkumham No. M.02.PR.08.10 of 2004 in Article 3 paragraph (1)

letter b and repeated in Article 4 paragraph (1) letter b. Article 1 point 5 UUJN states, "Notary organizations are professional organizations of Notary positions in the form of associations with legal entities". Article 82 paragraph (1) UUJN stipulates that: "Notaries gather in one forum for Notary Organizations". Article 82 paragraph (2) of the UUJN stipulates that: "The Notary Organization as referred to in paragraph (1) is the only free and independent Notary professional forum established with the intent and purpose to improve the quality of the Notary profession. Article 83 paragraph (1) UUJN stipulates that: "Notary organizations establish and enforce the Notary Code of Ethics". This is different from the situation before the enactment of the UUJN, which allowed notaries to gather in various notary organizations, which of course, would have consequences for the existence of various codes of ethics that apply to each of its members.

It can be concluded that law enforcement and notary legal protection must go hand in hand to achieve justice. Protection is given to them from the start in carrying out their duties as notaries starting with preventive supervisory actions and continuing with coaching actions and providing proper legal protection for notaries. Whether it is deliberate dishonesty or malpractice, it can violate the law or violates rules only. However, the difference between both of them is if it is deliberate dishonesty the notary violates the rules or regulations on purpose. The legal consequence is the notary is involved and could be held legally responsible. Meanwhile, if it is malpractice and the notary is inadvertent, the violation is general. Therefore the legal consequence of malpractice is only the extent of moral. Nonetheless, if the notary possibly did malpractice that cause a violation of law must be responsible for his or her involvement. Notaries need to be understood by their profession that they are someone who has certain functions and duties that cannot be equalized with others who do not carry the task. Law enforcement needs to be done properly. This shows that the notary is not above the law. Every mistake they make bears legal responsibility. Thus, it is hoped that violations in the future, especially

violations of criminal law involving notaries, will decrease, and perpetrators of violations can be dealt with as they should according to existing rules.

Conclusion

The basis of the notary's responsibility in carrying out their duties is whether or not there has been malpractice. The notary is responsible for the malpractice they have committed, both pure malpractice and deliberate dishonesty. The notary's liability due to malpractice by a notary needs to be sorted out whether the malpractice is pure malpractice that occurred due to the negligence of the notary or malpractice that occurred because of the notary's intention, which means it is an act of Deliberate dishonesty. Then it needs to be seen again whether pure malpractice or Deliberate dishonesty is only a procedural error that will lead to sanctions in terms of the code of ethics or UUJN or is a malpractice action that violates legal norms to give birth to legal sanctions. Malpractice sanctions are generally contained in the general code of ethics or general legal rules governing the profession. If there is a violation of the Criminal Law, the notary can be held criminally responsible. In the realm of criminal liability, the element of notary intent must be proven. Intentional proof of a notary is proof that seeks material truth. Both pure malpractice and malpractice are acts of deliberate dishonesty, placing a notary as a deed maker who can be held criminally responsible or accountable.

References

Adjie, Habib. *Hukum Notaris Indonesia (Tafsir Tematik Terhadap Undang-Undang Nomor 30 Tahun 2004 Tentang Jabatan Notaris)*. Bandung: Refika Aditama, 2009.

- . *Meneropong Khazanah Notaris Dan PPAT Di Indonesia (Kumpulan Tulisan Tentang Notaris Dan PPAT)*. Bandung: Citra Aditya Bakti, 2009.
- . “Sanksi Perdata Dan Administratif Terhadap Notaris Sebagai Pejabat Publik Berkaitan Dengan Pembuatan Akta Berdasarkan Undang-Undang Jabatan Notaris.” Disertasi, Program Doktor Fakultas Hukum Universitas Airlangga, Surabaya, 2007.
- Afifah, Kunni. “Tanggung Jawab Dan Perlindungan Hukum Bagi Notaris Secara Perdata Terhadap Akta Yang Dibuatnya.” *Lex Renaissance* 2, no. 1 (2017): 10.
- AmaliaTaufani. *Tinjauan Yuridis Malpraktek Medis Dalam Sistem Hukum Indonesia*. Surakarta: Fakultas Hukum Universitas Sebelas Maret, 2011.
- Bodiono, Herlien. *Kumpulan Tulisan Hukum Perdata Di Bidang Kenotariatan*. Bandung: Citra Aditya Bakti, 2008.
- Diatmika, I Gusti Agung Oka, I Dewa Gde Atmadja, Sri Utari, and Ni Ketut. “Perlindungan Hukum Terhadap Jabatan Notaris Berkaitan Dengan Adanya Dugaan Malpraktek Dalam Proses Pembuatan Akta Otentik.” Doctoral dissertation, Udayana University, 2014.
- Din, Teresia. “Pertanggungjawaban Notaris Terhadap Akta Otentik Terindikasi Tindak Pidana.” *Jurnal Penelitian Hukum De Jure* 19, no. 2 (2019): 171–83.
- Fuditia, Megacaesa, Ni Made Srinetri, and Anis Mashdurohatun. “Legal Protection Of Notary Recipients Of The Protocol For Deeds Which Allegedly Is Related To Legal Problems In Semarang City.” *Jurnal Akta* 7, no. 2 (2020): 177–82.
- Garner, Bryan A. *Black’s Law Dictionary*. Edited by St. Paul Minn. 7th ed. Minnesota: West Group, 1990.
- Hasan, Djuniatno, Agus Ekhsan, and Gunarto Gunarto. “Implementation of Legal Protection of Confidential Obligation Notary In Running Position.” *Jurnal Akta* 7, no. 2 (2020): 223–28.
- Hendra, Rahmad. “Tanggungjawab Notaris Terhadap Akta Otentik Yang Penghadapnya Mempergunakan Identitas Palsu Di Kota Pekanbaru.” *Jurnal Ilmu Hukum* 3, no. 1 (2012).
- Mowoka, Valentine Phebe. “Pelaksanaan Tanggung Jawab Notaris Terhadap Akta Yang Dibuatnya.” *Lex Et Societatis* 2, no. 4 (2014).
- Muhammad, Fabryan Nur, Yeni Widowaty, and Trisno Raharjo. “Penerapan Sanksi Pidana Terhadap Pemalsuan Akta Otentik Yang Dilakukan Oleh Notaris.” *Media of Law and Sharia* 1, no. 1 (2019): 1–13.
- Muri, Dewi Padusi Daeng, Galang Prayogo, and Faisal Arif. “The Rights and Obligations of Notaries According to Indonesian Law Concerning

- Notary Position.” *International Journal of Mechanical Engineering and Technology* 9, no. 8 (2018): 875–81.
- Nahak, Simon. “The Liability of Criminal Law towards a Notary Official in the Crime of Embezzlement at the Denpasar District Court.” *NOTARIIL Jurnal Kenotariatan* 5, no. 2 (2020): 107–17.
- Nico. *Tanggungjawab Notaris Selaku Pejabat Umum*. Yogyakarta: CDSBL, 2003.
- Ohiwutun, Y.A. Triana. *Bunga Rampai Hukum Kedokteran*. Malang: Banyumedia, 2007.
- Prajitno, A.A. Andi. *Pengetahuan Praktis Tentang Apa Dan Siapa Notaris Di Indonesia?* Surabaya: Putra Media Nusantara, 2010.
- Sholikhah, Entin, and Jawade Hafidz. “Perlindungan Hukum Terhadap Jabatan Notaris Yang Diduga Melakukan Malpraktek Dalam Proses Pembuatan Akta Otentik.” *Jurnal Akta* 4, no. 1 (2017): 47–50.
- Siahaan, Kartini. “Kedudukan Hukum Akta Notaris Sebagai Alat Bukti Pada Tindak Pidana Pemalsuan Surat Dalam Proses Peradilan Pidana.” *Recital Review* 1, no. 2 (2019): 72–88.
- Silalahi, Enriko, and Akhmad Khisni. “Legal Review Of Malpractice Notary In The Notary’s Deed.” *Jurnal Akta* 5, no. 3 (2018): 647–54.
- Soekanto, Soerjono, and Herkutowanto. *Pengantar Hukum Kesehatan*. Bandung: Rermadja Karya, 1987.
- Tedjosaputro, Liliana. *Etika Profesi Notaris (Dalam Penegakan Hukum Pidana)*. Yogyakarta: BIGRAF Publishing, 1995.
- Tobing, G.H.S. Lumban. *Peraturan Jabatan Notaris*. Jakarta: Gelora Aksara Pratama, 1982.
- Wirjomartani, Winanto. “Notary Malpractice in Carrying Out Their Duties and Authorities.” *Global Legal Review* 1, no. 2 (2021): 143–56.

DECLARATION OF CONFLICTING INTERESTS

The authors state that there is no conflict of interest in the publication of this article.

FUNDING INFORMATION

None

ACKNOWLEDGMENT

None

HISTORY OF ARTICLE

Submitted : August 29, 2022
Revised : September 19, 2022
Accepted : November 3, 2022
Published : November 28, 2022