

## EXAMINING THE LEGAL COMPETENCE OF CLIENTS WITH MILD COGNITIVE IMPAIRMENT: ETHICAL RESPONSIBILITIES OF A NOTARY IN THE EXECUTION OF A DEED

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### Abstract

The integrity of notarial deeds in Indonesia hinges upon the fulfillment of subjective legal requirements, principally the legal capacity to act and true consent (*wilsovereenstemming*), as mandated by Article 1320 of the Civil Code. This research addresses a critical contemporary challenge posed by clients diagnosed with Mild Cognitive Impairment (MCI). While MCI clients are formally considered legally competent (*de jure*), as they are typically not placed under formal guardianship, their functional cognitive deficits create a legal grey area, potentially invalidating the deed due to vitiated consent. This circumstance directly threatens the principle of legal certainty that notarial deeds are intended to uphold. This study employs Normative Legal Research with a Statute and Conceptual Approach, utilizing primary legal materials such as the Notary Law (UUJN) and the Civil Code, supplemented by professional ethical codes. The analysis focuses on the existing normative deficiencies in Indonesian law regarding the assessment of functional capacity beyond formal guardianship status. The conclusion highlights a significant demand for the expanded implementation of the Ethical Due Diligence Principle by notaries. This ethical responsibility must transcend minimum legal requirements. To protect vulnerable clients and minimize the risk of deed cancellation, notaries must adopt a Defensive-Protective Procedural Model. Key elements of this model include: 1) Developing robust, non-medical observation skills to detect MCI indicators; 2) Utilizing external verification mechanisms, such as requesting functional capacity certificates from medical specialists; and 3) Documenting every ethical precaution within the deed itself as a crucial defensive measure against future legal claims. This ethical expansion is necessary to safeguard both the client's interests and the integrity of the notarial profession.

**Keywords:** Notary, Legal Capacity, Mild Cognitive Impairment

## INTRODUCTION

A notary is a public official who plays a very important role in civil law in Indonesia to ensure legal certainty and legal order. This is in accordance with Article 1 of Act Number 2 of 2014 concerning Amendments of Act Number 30 of 2004 concerning the Position of Notary (hereinafter referred to as Law on Notary Position), which states that a Notary is a public official who has the authority to execute an authentic deed and has other authorities as referred to in this Law or other Laws. An authentic deed executed by a Notary, based on Article 15 paragraph (1) Law on Notary Position, states that the Notary has authority to execute an authentic deed concerning all actions, agreements, and determinations that are required by laws and regulations and/or required by an individual who has an interest to be stated in an authentic deed. Notary also guarantees the certainty of the date of deed execution, carries out the custody of deeds, issues the copies, Grosse, and excerpts of the deed, which should not be delegated or excluded to another official or individual as stipulated by the Law. Thus, it can be concluded that a deed executed by a Notary has a conclusive and perfect evidentiary force, also known as *Volledig En Bindend Bewijs*, where the deed is a conclusive legal evidence that is difficult to rebut in court (Sari & Dewi, 2020).

The major role of Notary is to realize the certainty of law and legal order in civil law because Notary, in carrying out their duties as public official, must have high integrity, which is implemented in preparing deed conducted in accordance with principles that must be adhered to, including the principles of prudence, accuracy, honesty, fairness, and compliance with the applicable laws and regulations (Moechthar, 2024). The validity of the deed is grounded in Article 1320 of the Indonesian Civil Code (IS, 2025):

- (1) There must be consent of the individuals who are bound thereby;
- (2) There must be the capacity to enter into an obligation;
- (3) There must be a specific subject matter;
- (4) There must be a permitted cause.

Article 1320 paragraphs (1) and (2) are subjective requirements, where failure to meet these requirements results in the agreement being voidable. Moreover, Article 1320 paragraphs (3) and (4) are objective requirements, where failure to meet these requirements results in the agreement being null and void by the law. Notarial authentic deed, particularly in subjective requirements, is more dominant because these requirements are one of the major requirements for an individual to execute a deed, which is the legal capacity to act and the concurrence of intent in relation to the deed to be executed.

Subjective requirements in executing a deed must be met, where failure to meet these requirements results in the agreement contained in the deed being voidable or *Vernietigbaar*, thereby substantially undermining the function of the Notary. In principle, the legal capacity of a subject can be seen from Articles 330, 433, and 1330 of the Indonesian Civil Code. Basically, legal capacity is not only determined by age, where those who have married before the age of majority can be considered legally competent, but also by mental and cognitive capacity to understand and comprehend legal consequences (Eskanugraha, 2021). However, defining non-formal capacity, other than guardianship (simple-mindedness, insanity, rage, or prodigality) as regulated in Article 434 of the Indonesian Civil Code (*Pengampuan*, 2025), is not easy, specifically for an individual with Mild Cognitive Impairment (hereinafter referred to as MCI).

Cognitive impairment can occur due to internal and external factors at all ages, so it is important for an individual to have identification of existing risk factors. These factors occur due to the influence of individuals, social factors, behavior, physical health, mental health, medication, and environment. One of the cognitive impairments is MCI. MCI is an early stage of cognitive impairment that is not too severe. The symptoms of MCI include impairment in one or more dominant aspects, such as memory, attention, speech, or executive function. Although an individual has MCI, the person is still able to carry out their activities properly; however, the constraints occur in completing complex tasks or activities (Suharti et al., 2024). The symptoms of MCI are not as severe as Alzheimer's or Dementia; people with MCI are still able to take care of themselves, but are accompanied by symptoms of frequently losing things, forgetting to attend important events or meetings, and having difficulty stringing words together compared to people of the same age (*What Is Mild Cognitive Impairment?*, 2021). This is different from dementia, which involves memory loss, difficulty communicating and thinking, disorientation regarding time and place, and changes in behavior and personality (*Demensia*, 2025).

Although people with MCI may appear normal in carrying out their daily activities, individuals with MCI are rarely placed under formal guardianship because they are still able to carry out major activities in their daily life. However, people with MCI may still be competent *de jure* or without guardianship, but their functional capacity to understand the substance of a deed *de facto* may still be in doubt. According

to the study conducted by Ekanugraha (2021), the state should guarantee legal certainty in regulating individual capacity to act legally, and this regulation is really important considering the minimum age stipulated by the laws and regulations varies, thereby resulting in many criticisms and suggestions among academics to carry out the harmonization of laws and regulations. In contrast, the maximum limit of individual capacity has not been discussed in laws and regulations. This is because, as individuals get older, they also have physical limitations that affect their abilities, specifically in the legal aspect. If there is no maximum age for legal capacity, it will cause many legal issues in society.

Another study conducted by Tanaya and Djajaputra (2020) explained that in Supreme Court Decision No. 892 K/Pdt/2017, concerning a conditional grant agreement executed by abusing the circumstances, thereby resulting in legal issues regarding the validity of the deed. As a consequence, the notary must also be responsible for the deeds. Ultimately, the grant agreement deed was declared invalid and void by the judge, and the notary was subjected to civil sanctions in the form of compensation, criminal sanctions in the form of imprisonment, and administrative sanctions. These two studies focus on the Dementia Cognitive Impairment or severe impairment compared to MCI. Thus, the author would like to study the legal capacity of clients with mild cognitive impairment as an ethical responsibility of the Notary in executing a deed. The researcher conducted this study because it can be a potential source of dispute for the third parties (heirs) to initiate legal action for the annulment of the deed based on a later defect in the agreement. This also has an impact on a Notary as an official who executes authentic deeds, as they do not execute deeds without considering the principles of prudence. Thus, the research problems are: How do the limitations of Indonesian positive law regulate the legal capacity of clients with MCI as a requirement for the validity of an authentic deed? And how should the principles of ethical prudence be implemented to ensure the concurrence of intent of clients with MCI?

## RESEARCH METHODS

This study was a normative legal study that focused on a comprehensive analysis of positive legal rules, especially synchronization between regulations and professional codes of ethics that are relevant to the doctrine of legal capacity and professional responsibilities. In analyzing the problems, the researcher used a statute approach through an in-depth study of the Law on Notary Position and the Indonesian Civil Code, and a conceptual approach to study legal principles of capacity to act, principles of prudence, the concurrence of intent, and the concept of functional capacity from the perspective of professional ethics. The sources of legal materials included primary legal materials in the form of Act Number 2 of 2014 concerning the Position of Notary, Indonesian Civil Code, and Indonesian Notary Code of Ethics, and secondary legal materials from scientific journals, theses, and dissertations discussing the professional ethics, consumer protection, and aspects of MCI. The technique of collecting legal materials was carried out systematically through library research by examining related documents and literature, which were then analyzed using descriptive analysis to describe comprehensively and clearly the norms of legal capacity in the Indonesian Civil Code and the fulfillment of Notary duties in accordance with the mandate of the laws.

## RESULTS AND DISCUSSION

### Limited Positive Law in Regulating Legal Capacity of Clients with MCI

Human, according to the law in Indonesia, is a legal subject and those who have rights and obligations. The rights are authority provided by law to a legal subject, while obligations are the burden provided by law to a legal subject (Ismamuddin, 2010). Moreover, the ability of a legal subject to perform a legal act is referred to as legal capacity (Lestari, 2008). Legal capacity is closely related to the individual's ability to perform a legal act, such as making a contract or agreement. In making a contract or agreement, legal capacity is required, which has been regulated in Article 1320 of the Indonesian Civil Code. Generally, every individual is considered to have legal capacity to perform a legal act, unless the law firmly states otherwise that the individual is not capable of performing a legal act. Although Articles 330, 433, and 1330 of the Indonesian Civil Code do not explicitly define who has "legal capacity" to perform a legal act, Article 1330 of the Indonesian Civil Code regulates the legal subjects who are considered not capable of making an agreement. Those who are not capable are:

- a. Minors.
- b. Individuals under guardianship.
- c. Married women (this provision has been repealed with the enactment of Act Number 1 of 1974 concerning Marriage).
- d. All other persons who are prohibited by the law from making certain agreements.

According to the exception regulated in Article 1330 of the Indonesian Civil Code, it can be concluded that legal subjects who are competent to perform a legal act or make an agreement are:

1. Adults (in the age of majority in accordance with legal provisions).
2. Those who are not under the guardianship.

This is in line with the basic principles that legal capacity is the rule and legal incompetence is the exception (N., 2015).

In the context of legal capacity, a Notary plays an important role in ensuring that the appearing parties and those who will perform the legal act have legally fulfilled the requirements as competent legal subjects (Stia, 2008). In carrying out their duties, a Notary must act objectively and not be biased, with the main focus on the public interest and not personal interests (Wirahutama et al., 2018). Thus, the role of a Notary is really important to enforce the law in Indonesia; psychologically, sociologically, economically, and politically, the notary profession is considered to have a high position within the general structure of society (Gnoffo, 1997). As one of the public officials (*openbaar ambtenaar*), the existence of a Notary aims to facilitate various matters related to civil law. Specifically, a Notary serves to meet community needs for strong evidentiary instruments through the execution of an authentic deed. The function and authority of a Notary are reinforced by the Law on Notary Position, which clearly stipulates in Article 1 paragraph (1) that a Notary is a public official authorized to execute authentic deeds and perform other authorities regulated by the law.

The aim of the principles of competence is to protect parties considered weak or vulnerable in legal acts and to ensure that every legal act is performed with full awareness. Competence is considered in line with the existence of free and perfect will, which means that an individual will be considered competent if they are able to consider the advantages and disadvantages of the act being performed. Civil Law in Indonesia explicitly regulates who is considered incompetent, but these criteria are limited and stated in the provisions of law. Similarly, when a person is considered competent, the agreement may still be voidable due to error, coercion, or fraud. This includes mild cognitive impairment (MCI), which can be voidable if it is based on error or abuse of circumstances rather than formal incompetence.

MCI is a mild cognitive decline that has not yet reached dementia and does not warrant guardianship because MCI is between the two categories: Formal capacity (Article 433 of the Indonesian Civil Code) and potential for defective will (Article 1320/1321 of the Indonesian Civil Code). Meanwhile, civil law in Indonesia has not yet recognized the concept of functional capacity, where this ability is the ability to make a decision. Functional capacity is used as the criterion of *de facto* that overrides *de jure* capacity. Based on the Article 16 paragraph (1) letter a of Law on Notary Position, Notary must act faithfully, honestly, diligently, independently, impartially, and safeguard the interests of parties involved in legal acts; moreover, implicitly, Notary is expected to be able to examine the formal and material validity of deed, including the capacity of parties appearing to execute their signature. The obligation of a Notary is not only to check the ID and guardianship status, but also to examine the will and psychological conditions of clients carefully. Moreover, when a Notary states that the parties have appeared and that they are competent to perform a legal act, these statements have conclusive evidentiary force according to Article 1870 of the Indonesian Civil Code. However, if in the future there is a party that accuses one of the parties of MCI incapacity, then the party making the accusation must prove it in court. It becomes a problem when the court finally annuls a deed because it is proven that the Notary is negligent, so the notary can be sued for civil liability and professional sanctions.

A fundamental issue in notarial practice arises when dealing with clients with Mild Cognitive Impairment (MCI), where juridical evidence on cognitive conditions has very complex technical constraints. In the context of a legal dispute, the burden of proof requires the plaintiff to demonstrate that the cognitive condition of the legal subject during the execution of the deed has been degraded so that they are unable to understand the substance of the agreement comprehensively. However, on the other side, a Notary, in a limited manner, does not have authority or clinical competence to perform such medical testing. The absence of standard guidelines and mechanisms in the Law on Notary Position concerning the procedures of examining the functional capacity of clients creates a gray area that poses a risk to the validity of an authentic deed and the security of the Notary's legal position. Along with the social dynamics, the urgency regarding the standardization of this competence is increasingly urgent. This is the time for the orientation of civil law to transform, from merely focusing on formal status (static legal capacity) to more inclusive and progressive protection to vulnerable groups, especially individuals with MCI. In the middle of limited norms in current positive law, the Notary Code of Ethics must be positioned as the major instrument where the dimension of ethics requires a Notary to perform cognitive due diligence that goes beyond the minimal procedural standards to maintain the integrity of the deed. In the future, cross-disciplinary harmonization integrating civil law, medical science, and psychology is required to formulate realistic and applicable legal criteria in assessing an individual's functional capacity. Through this study, it can be concluded that current positive law still has a legal gap in protecting clients with MCI optimally. Thus, the researcher would like to offer recommendations in

the form of legal reform that is able to ensure the integrity of authentic deeds while providing certainty and equal legal protection for all parties involved in legal acts.

### **The Implementation of Notary's Ethical Principles of Prudence on Clients with MCI**

Notary, to carry out their duties and obligations, must determine the principles of prudence, as these principles are the core of Notarial ethics by demanding actions that go beyond the formalities of positive law in order to protect the interests of all parties. Article 16, paragraph (1), letter a of the Law on Notary Position does not provide explicit meaning, but with the word "diligently", the Notary must be prudent in carrying out their duties. The duties of a Notary are not only recording but also ensuring the validity of the substance of the deed, which means that the Notary must be certain of the mental capacity and free will of all parties. Concurrence of intent means that the will being expressed must align with what actually occurs, and this can be obtained if the client is in a good mental condition. Notary is threatened when mild cognitive impairment or MCI attacks individual who will enter into a legal commitment with another party as it is not easy to detect MCI because client may appear normal but their critical thinking abilities are impaired, for example, when Notary reads deed, client may seem daydreaming, has blank stare, or when Notary ask a question, the client responds the question minimally.

This leads to a dilemma for a Notary, whether they must breach confidentiality and ask for the medical details of a client to protect the client, or remain silent and the deed has a risk of being voidable. The principles of prudence for a Notary are required for this. The first step in implementation is careful observation of the client's behavior, not only verifying the ID and guardianship status. After that, the notary must find non-medical indicators, such as confusion on time/place, repetitions of questions, and difficulty in explaining the purpose of the transaction. Notary must actively ask clients with MCI to repeat and explain the essence of the agreement in their own words, especially the long-term consequences. Ethical implementation requires the Notary to assess whether the client's will is consistent from the initial meeting to the execution of the deed. The professional ethics require a Notary to ensure that clients with MCI are not accompanied by third parties with a conflict of interest that have the potential to exploit the client. Notary is obliged to use the simplest and clearest language when reading the deed, adapting to the level of understanding of the client suspected of having MCI.

Notary's deed should include a clause stating that the Notary has specifically asked and ensured the concurrence of intent and understanding of the client. The inclusion of notation is not only ethical but also strategic, as it strengthens the conclusive evidentiary force of the deed in front of the court. All supporting documents, such as medical certificates or specific notes, must be archived securely as part of the deed's minutes for future accountability. The role of the Indonesian Notaries Association (INI) is to formulate SOP that explicitly regulates the procedures of implementing the principles of prudence towards clients with indications of MCI. The ethical principles of prudence must be implemented through the combination of critical observation, the use of non-medical tools, and meticulous documentation, resulting in double safeguard: protecting clients and protecting the integrity of the Notary profession.

### **CONCLUSION**

Indonesian positive law, as stated in Articles 1320 and 433 of the Indonesian Civil Code, has normative limitations in regulating the condition of Mild Cognitive Impairment (MCI). Formally (*de jure*), clients with MCI are considered competent because they are not under the guardianship decision. However, substantively (*de facto*), the conditions of MCI have the potential to cause the defect of will (*wilsovereenstemming*) during the execution of a deed, thus threatening the material validity of an authentic deed. This contradiction creates legal uncertainty and opens the deed to challenges for annulment.

The ethical principles of prudence (*Verplichting Tot Zorg*) regulated in the Notary Code of Ethics must be implemented beyond the minimum legal standard to address the weakness of positive law. This implementation requires Notary to: Carry out Cognitive Due Diligence: Developing the ability of non-medical observation to identify the indicators of MCI (red flags); Prioritize Protection: Determining the client's protection as the major priority, even if it creates a dilemma with the principles of professional confidentiality, and using the refusal to execute a deed as the last resort (*ultimum remedium*) if doubts persist.

Overall, MCI challenges require a Notary to transform from merely recording official documents to functional gatekeepers who actively assess mental capacity, which requires procedural reformation in the professional Code of Ethics.

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