

***Case on Korean Bar Association's Regulations Governing
Attorney Advertising***

[2021Hun-Ma619, May 26, 2022]

In this case, the Court held that certain provisions of the Korean Bar Association's Regulations on Attorney Advertising, which govern, *inter alia*, the content and method of attorney advertising, violate the principle of statutory reservation or the principle against excessive restriction and thus infringe upon Complainants' freedoms of expression and occupation.

Background of the Case

Complainants are lawyers and an online legal service provider. The Korean Bar Association wholly amended the Regulations on Attorney Advertising on May 3, 2021. Complainants filed this constitutional complaint on May 31, 2021, arguing that some of the provisions infringe, among others, their freedoms of expression and occupation.

Subject Matter of Review

In this case, the subject matter of review is whether Article 3, Section (2), Article 4, Items 12 and 13, and the part "an advertisement including content that is contrary to the authoritative interpretation of the Association" of Item 14 in the same Article, Article 5, Section (2), Items 1, 2, 3 and 5, the main text of Article 8, Section (1), Section (2), Items 2 and 3, and the part "where its purpose or means is an act that is in violation of the authoritative interpretation of the Association" of Item 4 in the same Section of Korean Bar Association's Regulations on Attorney Advertising (wholly amended on May 3, 2021, hereinafter referred to as the "Regulations at Issue") (the above provisions are hereinafter collectively referred to as the "Provisions at Issue") infringe upon Complainants' fundamental rights. The Provisions at Issue read as follows:

Provisions at Issue

Article 3 (Subject of Advertisement)

- (2) Attorneys-at-law, etc. shall not display the name, business name, or other trade names of other attorneys-at-law, non-lawyers, individuals, groups, business entities, etc. (hereinafter referred to as “others”) in advertisement for the purposes, *inter alia*, of sales or promotion of others.

Article 4 (Restrictions on Contents of Advertisement, etc.)

Attorneys-at-law, etc. shall not conduct any advertisement listed below directly by themselves or through others:

12. Advertisement that carries details concerning the acceptance of cases or legal affairs for free or at unfairly low fees, which may disrupt the fair acceptance of cases
13. Advertisement that carries details that predict the results of dispositions by investigative and administrative agencies and court decisions, etc.
14. Advertisement containing information that is in violation of statutes, Code of Ethics for Attorneys, or regulations of the Korean Bar Association (hereinafter referred to as “the Association”) and local bar associations or which is contrary to the authoritative interpretation of the Association

Article 5 (Restrictions on Methods of Advertisement, etc.)

- (2) Attorneys-at-law, etc. shall not make a request for, or participate, or cooperate in advertising, publicizing, or introducing persons (regardless of who they are, including individuals, legal entities, and other organizations) who perform any of the following acts:
1. The act of connecting attorneys-at-law and consumers or advertising, publicizing, or introducing attorneys-at-law, etc., in order to introduce, broker, or solicit in relation to a legal consultation or the acceptance of a legal case, etc. in exchange for money or other economic considerations (arrangement fee,

brokerage fee, commission, membership fee, subscription fee, or advertising fee, regardless of how they are called, either on a regular or non-regular basis) from attorneys-at-law or consumers;

2. The act by persons other than the subject of advertisement—attorneys-at-law, etc.—of connecting attorneys-at-law, etc., and consumers, or advertising, publicizing, or introducing attorneys-at-law, etc. by means of indicating their names, company names, or trade names, or other methods of revealing themselves;
3. The act of dealing or providing services that predict the results of dispositions by investigative and administrative agencies and court decisions, etc. even though they are not attorneys-at-law, etc.;
5. The act of indicating the dealing or provision of services offered by attorneys-at-law, etc. or any other act that may mislead consumers to believe that they are attorneys-at-law, etc. even though they are not.

Article 8 (Advertisement for Legal Consultation)

- (1) Attorneys-at-law, etc. shall be prohibited from running an advertisement by means of offering free-of-charge or unfairly low-priced legal consultation. Provided, this provision shall not apply if such advertisement is not likely to disrupt the fair acceptance of cases, such as in the public interest.
- (2) Attorneys-at-law, etc. shall not conduct any advertisement listed below concerning legal consultation or allow others with such business structures to do so:
 2. Where attorneys-at-law, etc. or consumers offer money or other economic considerations for arrangement or brokerage (arrangement fee, brokerage fee, commission, membership fee, subscription fee, or advertisement fee regardless of how they are called, either on a regular basis or non-regular basis) of legal consultation to others

3. Where attorneys-at-law, etc. participate in legal consultation offered as part of others' sales or promotion strategy
4. Where its purpose or means is an act that is in violation of statutes, regulations, or the authoritative interpretation of the Association

Summary of the Decision

1. Whether the provisions prohibiting advertisements in violation of the authoritative interpretation of the Association violates the principle of statutory reservation (positive)

The part concerning “an advertisement containing information that is contrary to the authoritative interpretation of the Association” in Article 4, Item 14 of the Regulations at Issue, and the part “where its purpose or means is an act that is in violation of the authoritative interpretation of the Association” in Article 8, Section (2), Item 4 of the Regulations at Issue (hereinafter referred to as the “provisions prohibiting advertisements in violation of the authoritative interpretation of the Association”) prohibit lawyers from running advertisements which contain information that is in violation of the authoritative interpretation of the Association.

The above provisions only indicate advertisements “in violation of the authoritative interpretation of the Association” while they do not specify the content and method of advertisements banned thereunder. Even after examining the Attorney-At-Law Act and relevant regulations of the Association, it is difficult to know what information constitutes such prohibited advertisements. Considering that a breach of the provisions prohibiting advertisements in violation of the authoritative interpretation of the Association may serve as a ground for disciplinary action, at least attorneys-at-law who are the norm-addressees should get a brief understanding of what information may constitute such violations.

However, the Provisions at issue are so vague as to hamper the predictability of regulation and allow for arbitrary interpretation by law enforcement authorities.

Since it is difficult to believe that the provisions prohibiting advertisements in violation of the authoritative interpretation of the Association clearly define the scope of regulation within the authority delegated by the enabling Act, these provisions violate the principle of statutory reservation and thus infringe upon Complainants' freedoms of expression and occupation.

2. Whether the provision prohibiting advertisements in exchange for economic considerations violates the principle against excessive restriction (positive)

Attorneys-at-law, the norm-addressees of the Regulations at Issue, are subject to regulation under the part of “the act of advertising, publicizing or introducing attorneys-at-law” in Article 5, Section (2), Item 1 of the Regulations at Issue (hereinafter referred to as the “provision prohibiting advertisements in exchange for economic considerations”), and the act of the other party subject to regulation is the act of advertising, publicizing or introducing attorneys-at-law, etc. in order to introduce, broker or solicit in relation to legal consultation or cases, etc. in exchange for economic considerations from attorneys-at-law or consumers.”

Given that the above provision specifies that the purpose of the act of advertising, publicizing, and introducing regulated thereunder is to introduce, broker, or solicit while it does not confine the scope of application to certain attorneys-at-law and that the above-mentioned act is designed to persuade consumers and induce them to purchase services, the provision prohibiting advertisements in exchange for economic considerations cannot be deemed to simply regulate again the act of introduction, brokerage and solicitation banned under the Attorney-At-Law Act. In other words, the act of advertising, publicizing, and introducing

an unspecified number of lawyers for introduction or solicitation with respect to a legal consultation or the acceptance of a legal case, etc. is understood to fall within the scope of acts banned under the above provision.

While attorney advertising needs to be reasonably regulated, considering that advertising expression has the character of a fundamental right, it is desirable to accept a broad range of advertisements except for restrictions absolutely necessary in relation to the content and method of advertising. In light of the intent of Article 23(1) of the Attorney-at-law Act, which allows, in principle, attorney advertising through different media, it should be understood that attorneys-at-law, etc., are allowed to pay advertisers in different media channels for advertising. Thus, the above provision banning such acts uniformly cannot be deemed an appropriate means to accomplish the legislative objectives.

The legislative objectives can be achieved not only by the provision prohibiting advertisements in exchange for economic considerations but also by the Attorney-at-Law Act and other regulations and lesser means, such as restricting advertisements that contain information that may disrupt the fair acceptance of cases or cause harm to consumers can also achieve the legislative purposes to the same extent. Further, while it is unclear whether the legislative objectives can be achieved by the above provision, it practically bans lawyers from requesting an advertising agency to place an advertisement in exchange for a fee, which would lead to a significant restriction on Complainants' freedoms of expression and occupation. Thus, the above provision failed to meet the requirements of the least restrictive means and balance of interests.

Therefore, the provision prohibiting advertisements in exchange for economic considerations infringes upon Complainants' freedoms of expression and occupation in violation of the principle against excessive restriction.

Summary of Dissenting Opinion of Three Justices Concerning the Provision Prohibiting Advertisements in Exchange for Economic Considerations

The provision prohibiting advertisements in exchange for economic considerations should be interpreted to ban attorneys-at-law, etc., from asking for an advertisement from persons who run an advertisement in order to introduce, broker, or solicit cases, etc. to certain lawyers in exchange for economic considerations rather than banning lawyers, etc. from engaging in any advertising activities. This conforms to the intent of delegating authority as specified in Article 23, Section (2), Item 7 of the Attorney-at-law Act.

While attorney advertising takes the form of an advertisement, it should be regulated if it practically intends to broker, among others, cases in exchange for economic considerations. However, there may be a vacuum in regulating such acts under the existing Attorney-at-law Act. Also, as the methods and forms of advertisements become diverse with technological advancement, some advertisements may go further than the traditional methods of advertising, which simply inform services, and they themselves have the effect of introducing, brokering, and soliciting services. Moreover, attorneys-at-law, etc., are allowed to ask for placing an advertisement that is not intended to introduce, broker, and solicit cases, etc. Further, Korean Bar Association has broad discretion delegated by the Attorney-at-law Act in determining the methods, etc., of advertisements banned thereunder. In light of the above, the provision prohibiting advertisements in exchange for economic considerations meets the requirement for the least restrictive means test, and it meets the balance of interests condition because the private interest restricted by the Provision at Issue is outweighed by the public interest of ensuring the fair acceptance of cases, among others.

Therefore, the provision prohibiting advertisements in exchange for

economic considerations does not infringe upon Complainants' freedoms of expression and occupation in violation of the principle against excessive restriction.

Summary of Concurring Opinion of Four Justices Concerning the Provisions Prohibiting Advertisements in Violation of the Authoritative Interpretation of the Association

The authoritative interpretation of the Association can easily change according to its will because there is no regulation on the procedures of establishing and appealing the authoritative interpretation. Therefore, it is difficult to believe that it provides norm-addressees with predictability or excludes the possibility of arbitrary interpretation by law enforcement authorities. Furthermore, a violation of the provisions prohibiting advertisements in violation of the authoritative interpretation by the Association immediately constitutes grounds for disciplinary action, which is likely to undermine the freedom of expression. If the appearance of a new type of advertisement that cannot be addressed by the existing regulations creates a vacuum in regulation, it should be regulated by amending the relevant regulations of the Association.

Accordingly, the above provisions infringe upon Complainants' freedoms of expression and occupation in violation of the principle against excessive restriction.