* "If an operator of a motor vehicle, after being arrested for a violation of R.S. 39:4-50, shall refuse to submit to the chemical test provided for in section 2 of this act when requested to do so, the arresting officer shall cause to be delivered to the Director of Motor Vehicles his sworn report of such refusal in which report he shall specify the circumstances surrounding the arrest and the grounds upon which his belief was based that the person was driving or operating a motor vehicle in violation of the provisions of R.S. 39:4-50. Upon receipt of such a report, if the director shall find that the arresting officer acted in accordance with the provisions of this act, he shall, upon written notice, suspend the person's license or permit to drive or operate a motor vehicle, . . . unless such person, within 10 days of the date of such notice, shall have requested, in writing, a hearing before the director. Upon such request, the director shall hold a hearing on the issues of whether the arresting officer had reasonable grounds to believe the person had been driving or was in actual physical control of a motor vehicle on the public highways or quasi-public areas of this State while under the influence of intoxicating liquor, whether the person was placed under arrest, and whether he refused to submit to the test upon request of the officer. If no such hearing is requested within the time allowed or if after a hearing the director shall find against the person on such issues, he shall revoke such person's license or permit to drive or operate a motor vehicle, ... Such revocation shall be independent of any revocation imposed by virtue of a conviction under the provisons of R.S. 39:4-50."

**"[I]n connection with a subsequent offense of this section" requires revocation for one year in connection with a subsequent offense of driving while intoxicated with or without regard to a prior breath refusal. *Attorney General's Formal Opinion* No. 13—1977.

September 20, 1977

TO THE MEMBERS OF ALL PROFESSIONAL BOARDS

FORMAL OPINION 1977—No. 20.

As you are probably aware, the Supreme Court of the United States has recently decided several cases which have a significant impact upon the authority of the states to regulate advertising by professionals. These decisions represent definitive interpretations of the requirements of the United States Constitution and are binding upon the State of New Jersey. We therefore have concluded that it would be appropriate to set forth our interpretation of these decisions for the benefit of the professional boards.

In *Virginia State Board of Pharmacy, et al. v. Virginia Citizens Consumer Council, Inc., et al.*, 425 U.S. 748 (1976) the Court invalidated a Virginia statute which had declared it unprofessional conduct for a licensed pharmacist to advertise the price of prescription drugs. The Virginia statute which prohibited the dissemination of information concerning the cost and availability of prescription drugs was found to be inconsistent with the First Amendment to the United States Constitution. The Court noted:

> ". . . Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large

measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable . . ." 425 U.S. at 765.

After the decision in the *Virginia Board of Pharmacy* case, the New Jersey Board of Examiners of Ophthalmic Dispensers and Ophthalmic Technicians asked this office for an opinion concerning the constitutionality of N.J.S.A. 52:17B-41.17, which prohibited price advertising of ophthalmic goods by ophthalmic dispensers and technicians. In *Formal Opinion No. 4 of 1977*, issued on March 17, 1977, we concluded that this blanket statutory prohibition against price advertising of ophthalmic goods was substantially similar to the prohibition against price advertising by pharmacists declared unconstitutional in the *Virginia Board of Pharmacy* case and therefore was similarly unconstitutional. We refrained in that opinion from considering the constitutionality of other forms of advertising by professionals, not involving the selling of standardized products such as ophthalmic frames and lenses or prescription drugs, since *Bates v. State Bar of Arizona* was then pending before the Supreme Court of the United States and we anticipated that the decision in that case would further illuminate the constitutional restrictions upon the regulation of advertising by professionals.

In its decision in *Bates*, issued on June 27, 1977, the Supreme Court held that the First Amendment protects the right of lawyers to advertise the prices at which certain routine services will be performed. It also indicated that there could be no prohibition against advertisements which include other factual materials, such as an attorney's name, address, and telephone number, office hours and the like. The Court therefore held that a State may not prevent the publication in a newspaper of a truthful advertisement concerning the availability and terms of routine legal services.

Although the immediate subject of the Court's opinion in *Bates* was advertising by attorneys, the Court's analysis of the First Amendment protections provided professional advertising is equally applicable to other professions. The Court's reasons for rejecting various justifications proffered for the prohibition against price advertising by attorneys, such as the adverse effect on professionalism, the inherently misleading nature of attorney advertising, the undesirable economic effects of advertising and the adverse effect of advertising on the quality of service, indicates quite clearly that the Court would not accept such justifications for a blanket prohibition against advertising by other professionals. We further note that the Court in a footnote quoted at length from new guidelines on advertising adopted by the Judicial Council of the American Medical Association. There also are references in the Court's opinion to other professions, such as pharmacy and barbering, which reinforce our conclusion that the Court's basic reasoning is equally applicable to all professions. We therefore advise you that in light of the *Bates* decision, any total prohibition against advertising by professionals is violative of the First Amendment to the United States Constitution.

The Court also made it very clear, however, that its holding in *Bates* does not preclude reasonable regulation of advertising where the responsibilities of a particular professional demand such regulation. The Court said:

"In holding that advertising by attorneys may not be subjected to blanket suppression, and that the advertisement at issue is protected, we, of

course, do not hold that advertising by attorneys may not be regulated in any way. We mention some of the clearly permissible limitations on advertising not foreclosed by our holding.

"Advertising that is false, deceptive, or misleading of course is subject to restraint . . . . In fact, because the public lacks sophistication concerning legal services, misstatements that might be overlooked or deemed unimportant in other advertising may be found quite inappropriate in legal advertising. For example, advertising claims as to the quality of services—a matter we do not address today—are not susceptible to measurement or verification; accordingly, such claims may be so likely to be misleading as to warrant restriction. Similar objections might justify restraints on in-person solicitation. We do not foreclose the possibility that some limited supplementation, by way of warning or disclaimer or the like, might be required of even an advertisement of the kind ruled upon today so as to assure that the consumer is not mislead. In sum, we recognize that many of the problems in defining the boundary between deceptive and non-deceptive advertising remain to be resolved, and we expect that the bar will have a special role to play in assuring that advertising by attorneys flows both freely and cleanly.

"As with other varieties of speech, it follows as well that there may be reasonable restrictions on the time, place, and manner of advertising . . . . Advertising concerning transactions that are themselves illegal obviously may be suppressed . . . . And the special problems of advertising on the electronic broadcast media will warrant special consideration . . . .

"The constitutional issue in this case is only whether the State may prevent the publication in a newspaper of appellants' truthful advertisement concerning the availability and terms of routine legal services. We rule simply that the flow of such information may not be restrained . . . ." *Bates v. State Bar of Arizona,* 97 S. Ct. at 2708-2709.

It is our opinion that just as the Court in *Bates* recognized that there are permissible limitations upon advertising within the legal profession, it also would sustain similar limitations in other professions. However, the justifications for limitations upon advertising undoubtedly will vary depending upon the services provided by each particular profession and other pertinent considerations. Therefore, it would be impossible to set forth a single guideline for permissible limitations on professional advertising that would govern every profession. Rather, we feel that it should be the responsibility of the respective professional boards, at least in the first instance, to review the regulatory requirements of the professions they are charged with regulating in light of the Court's decision in *Bates*. We would urge the boards in such review to consult with appropriate professional societies and associations to secure their views. The deputy attorneys general assigned to the boards also will be available to provide further legal guidance where appropriate.

I look forward to an early completion by the boards of the required reexamination of all limitations upon advertising by the professions so that we may have assurance professional advertising in New Jersey is being regulated in a manner consistent with the *Bates* decision.

Very truly yours,

WILLIAM F. HYLAND
Attorney General