Attorney Code of Conduct review

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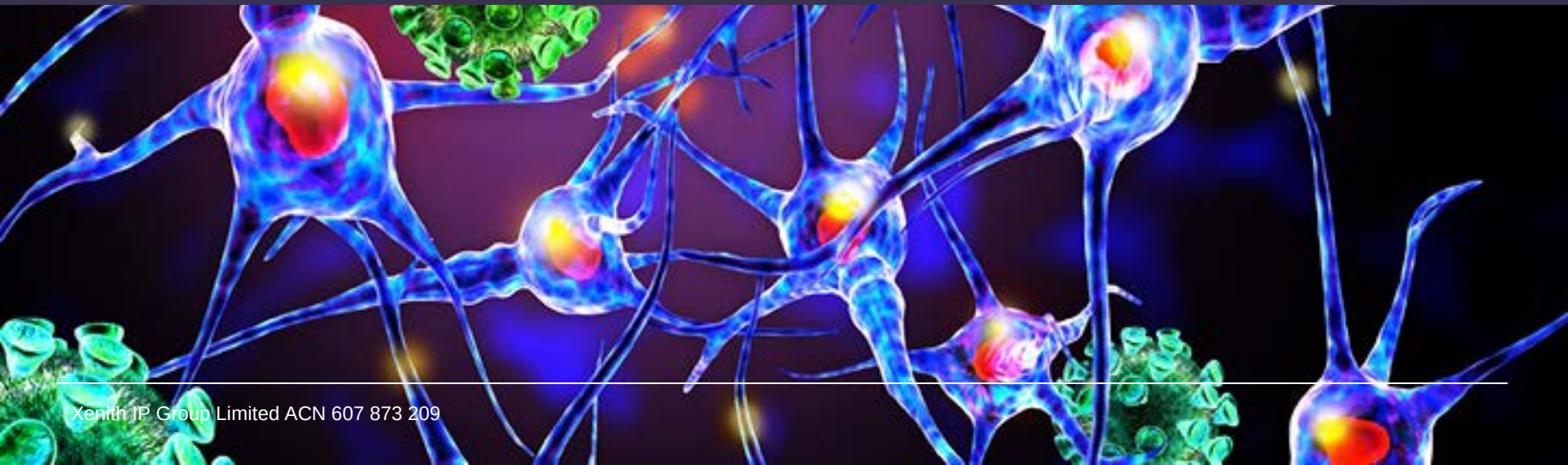

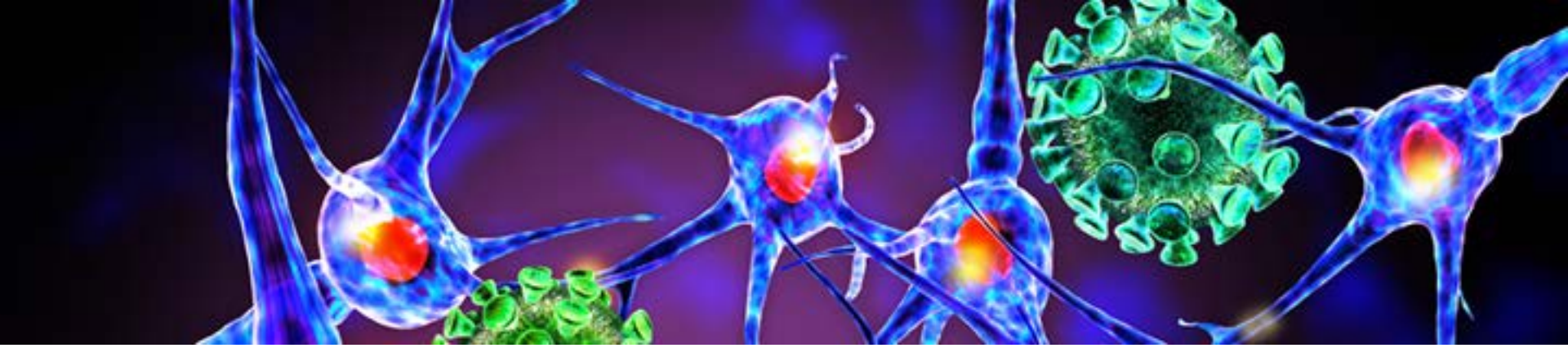

Agenda

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2. Operational independence – desired outcomes
3. Operational independence – practical implementation
4. Duty-interest considerations
5. Support services
6. Transparency
7. A perspective from the Courts
8. A Xenith IP Group perspective

Overview

Current proposals

- In essence, common ownership of incorporated attorney practices is a legitimate business structure
- Commonly owned practices should *not* be treated as other than separate practices, and should not be treated as business associates, …. *provided they are operated independently*

What are the key determinants of operational independence?

- Guidelines should focus on key principles and avoid being unduly prescriptive
- Emphasis should be on desired outcomes, *not* dictates around the means by which those outcomes might be achieved (c.f. patent “claim by result”)

Operational independence

Desired outcomes – what actually matters?

- The ability of IP attorneys to fully discharge their professional duties as specified in the code – to act:
  - *In accordance with the law*
  - *In the best interests of clients*
  - *In the public interest*
  - *In the interests of the profession as a whole.*

Fundamentally this should mean

- The professional duties of each firm and its attorneys to their respective clients must be exercised independently (i.e. not compromised by virtue of any common ownership relationships)
- There must be no reasonable possibility of the passing of confidential information of clients between firms in the group.

Operational independence

Desired outcomes vs artificial barriers to commerce

- If these outcomes are achieved, without compromise or constraint, then:
  - the particularities of the capital, ownership and management structures of the firms should not matter; and
  - the code should *not* restrict the commercial freedoms of those businesses to coordinate and manage their operations as they see fit.
- There is nothing in the model of a listed public company owning multiple attorney firms which is inimical to the continued primacy of the professional duties of each of the operating subsidiaries (or their employed attorneys) to their clients....
- ....just as there is nothing in the model of a listed airline such as Qantas treating passenger safety as its highest responsibility – (which is also in the best interests of shareholders).

Operational independence

Practical implementation within Xenith

- The separate firms in Xenith IP Group operate from separate secured premises,
- as discrete and independent entities,
- under separate management,
- with no common directors on their respective boards,
- and professional duties explicitly mandated as paramount.
- All client information and client communications of each firm are strictly quarantined and subject to rigorous independent penetration testing.
- There is no overlap between the lawyers and attorneys within the respective firms, all of whom are employed directly by and within their particular businesses.
- The IP firms in the group compete directly against one another in the market – with transparency of ownership, and no internal lines of communication between them (other than arm's length) at the client level.
- Rigorous structures, systems and protocols ensure there is no possibility of client advice, communications or confidential information being compromised.

Duty-interest

Duty-interest conflict?

- It has been suggested that a so-called “duty-interest” conflict must always arise where an attorney in firm A, which is owned by X, owns shares in X, because the attorney’s interest is to maximise the profits of X for the benefit of X’s shareholders.
- The same could be said where an attorney in firm B is an owner of B in a traditional partnership. In both cases, there is an underlying profit motive, but the attorney is under a professional duty to act in the client’s best interests and to place the client’s interests above the attorney’s interests in maximising the profits of A, X or B.
- This hierarchy of duties has been repeatedly emphasised to XIP shareholders and employees through the prospectus and other market facing documents, as well as a range of internal policies, procedures and client communications.
- In fact, any duty-interest conflict is amplified with increasing shareholder concentration, and is actually dissipated through the more diversified shareholding of the listed IP groups.
- (*c.f. Arguably “conflict” incentive is circa 100 times greater in a sole practice, with far less regulatory and governance oversight!).*

Support services

Sharing of support services

- Integration or sharing of “back-office” systems and support services (telecomms, IT etc) does not in any way compromise the operational independence in the relevant sense, *provided that*:
  - appropriate protocols and system architectures are implemented to ensure that the primacy of professional duties is maintained, and each attorney firm’s confidential client information is strictly quarantined from the other firms in the group.
- In traditional IP and law partnerships, back-office functions are often outsourced to specialist agencies providing similar services to a multitude of other businesses (some competing). Examples include:
  - payroll
  - HR support
  - IT system hosting, maintenance, software development and technical support,
  - financial services including accounts payable, accounts receivable and credit control
  - legal process outsourcing (LPO) & typing services.

Transparency

Normal course of business

- It should be sufficient for a commonly owned practice to clearly disclose on the firm's website, letterhead, email signature blocks and terms of engagement that it is owned by the holding company....
- ....and for the holding company to clearly disclose on its website the ownership of all of its subsidiaries.

Contentious matters (e.g. adversarial disputes)

- Where opposing parties are represented by independently operated firms under common ownership, as a matter of commercial common sense (not actual conflict) Xenith supports a requirement for *reasonably informed consent*.
- However, it should be left to firms concerned to determine the specific form of disclosure and consent to satisfy the substantive requirements in the circumstances of each case.

A perspective from the Courts

- In *Dealer Support Services Pty Limited v. Motor Trades Association of Australia Limited [2014] FCA 1065*, Beach J. made the following comments,...

> *"…Firms merge with other firms, nationally and internationally. Large commercial firms produce economies of scale and scope. Mergers and looser alliances are to be encouraged. They produce such economies and enhanced expertise flowing from increased specialisation. Further, there is an accelerating flow of individual movements between firms. Further, clients themselves shop around. There is less loyalty from their side. Not only do they switch firms more regularly, using modern commercial tools such as tenders and expressions of interest, but they will use different firms for different purposes. Both sides of the equation desire and demand free flow of movement. Indeed, there may be a public interest in promoting such fluidity.*

> ***"In this dynamic and complex environment, a basis for disqualification [of a lawyer or firm from acting for a client] should have its foundation in real vice or it should not be propounded"***

- The clear direction is to avoid unnecessary restrictions, to allow business structures to continue to evolve, to support clients' freedom to choose their attorneys, and not to impede without good cause the legitimate commercial activities of professional services firms.

A Xenith perspective

In summary

- Xenith fully supports maintenance of the highest professional standards.
- Xenith's corporate structure, policies and procedures have been carefully designed from the outset to avoid conflicting interests and duties
- Xenith encourages the Standards Board to focus on key points of principle and intended outcomes.
- In Xenith's view, it is important for the Standards Board to avoid being overly prescriptive, given the risks of:
  - unintended consequences as technologies and business structures continue to evolve;
  - unnecessarily restricting clients' freedom to choose their attorneys;
  - needlessly restricting the legitimate commercial activities of firms, whether operating in a corporate group or in more traditional ownership structures; and
  - needlessly stifling innovation in business structures, service delivery models and supporting technologies.

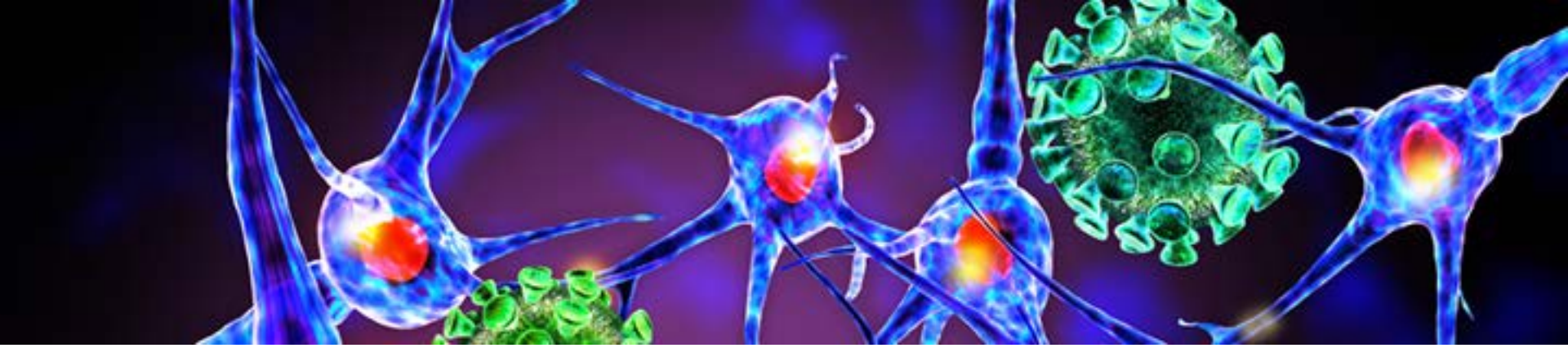
A Xenith perspective (cont'd)

Current regulations

Xenith IP Group and its employed attorneys are already subject to:

- the Corporations Act
- the ASX listing rules
- the Australian Consumer Law
- the Australian Solicitors Conduct Rules
- the Attorneys Code of Conduct
- the IPTA Code
- rigorous governance oversight and internal controls.

- Unless demonstrably necessary, the Standards Board should be wary of further regulation, where:
  - professional duties of patent attorneys and lawyers are well defined,
  - principles for avoidance and resolution of conflicts of interest are well established,
  - there is healthy competition between a large number of IP attorney firms, and
  - there is no evidence of any actual problem to be solved.



Questions?

Thank you !