

ASSESSING UNGOVERNABILITY

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Roadmap

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- Duty to cooperate during investigations
- Factors for assessing ungovernability
- Case law review
- Practical tips for dealing with difficult practitioners



Duty to Co-operate

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- Section 76(3) and (3.1) of the Code:

Obstruction prohibited

(3) No person shall obstruct an investigator or withhold or conceal from him or her or destroy anything that is relevant to the investigation.

Member to co-operate

(3.1) A member shall co-operate fully with an investigator.

- Parallel provisions in most enabling statutes

Duty to Co-operate

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- Failure to respond to a complaint can be sufficient
- Co-operation must be honest, open and helpful
- What constitutes a failure to co-operate?
 - Hiding charts / records
 - Refusing to permit entry
 - Lying to investigators



What is Ungovernability?

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A pattern of conduct that demonstrates a member is unprepared to recognize their professional obligations and the regulator's role

What is Ungovernability?

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“an inability to respond appropriately to authorities who are authorized to supervise and oversee how he governs himself in his professional life”

- *Mundulai v Law Society of Upper Canada* (2014)

Factors re: Ungovernability

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- Nature, duration and repetitive character of the misconduct
- Any prior discipline history
- Any character evidence
- The existence or lack of remorse

Factors re: Ungovernability

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- Degree of willingness to be governed by regulator
- Medical or other evidence that explains the misconduct
- Likelihood of future misconduct
- Practitioner's ongoing co-operation with regulator in addressing any outstanding matters

Case Law Review

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- *Kuny v College of Registered Nurses of Manitoba (2018)*
 - A refusal to take direction from and accept the authority of a regulator amounts to ungovernability
- *Hanson v College of Physicians and Surgeons of Ontario (2021)*
 - A prior discipline history and continued misconduct following remediation makes a practitioner irremediable

Case Law Review

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- *Park v Royal College of Dental Surgeons of Ontario (2021)*
 - Repeatedly breaching undertakings restricting the practitioner's ability to perform a particular procedure amounted to ungovernability
- *Schwarz v College of Physicians and Surgeons of Ontario (2021)*
 - Ungovernability is a finding of fact and can be based on previous unsuccessful remediation

Practical Tips for Regulators

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- During the investigation stage:
 - Set clear expectations up front
 - Be specific with requests
 - Give little wiggle room
 - Communicate next steps / consequences
 - Document instances of non-compliance

Practical Tips for Regulators

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- Generally:
 - Ensure continuity of records re: prior history
 - Follow up on remediation programs
 - Don't respond to personal attacks
 - Don't take it personally
 - Always take the high road

Practical Tips for Regulators

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Key Question: Does the regulator
retain the ability to govern the practitioner
in the public interest?



Contact Us

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