Scenarios for IIC Annual Seminar ethics breakout session:

A

Attorney represents Claimant, who allegedly suffered C-spine injury as result of work accident. Claimant's doc says that injuries are related to the accident. Surety retains another doc who examines Claimant and opines that Claimant's C-spine condition is pre-existing and that the accident, at the very most, temporarily aggravated Claimant's neck problems. He opines that Claimant has returned to her pre-injury baseline, and her residual problems are entirely related to her pre-existing condition. Based on this expert opinion the WC surety denies responsibility for further medical treatment. Claimant's treating doc recommends cervical fusion for Claimant, and, again, relates need for same to accident. Claimant has non occupational medical insurance through her employer. The policy establishes a first dollar right of subrogation to the proceeds of any award that might eventually be paid by a primary obligor, in this case the WC surety. The policy is an ERISA policy, which provides that the insurer is entitled to recover the entirety of its subrogated interest without deduction for attorney fees incurred in procuring recovery from the primary obligor. Attorney is aware of the policy language. Claimant has the surgery, which is paid for by the non-occupational medical insurer. Things go badly. $200,000 in medical payments are made before Claimant is eventually released as medically stable. She is given certain restrictions, and Attorney works up the disability aspects of the case by retaining a voc rehab expert. The case is set for hearing on all issues, including whether the WC surety is responsible for the payment of the medical expenses Claimant incurred following the sureties denial of responsibility. The WC surety

decides that it no longer is so wedded to its absolute denial of responsibility and invites settlement discussions. Eventually the parties agree to settle the claim on a full and final basis for $300,000. The WC surety prepares a Lump Sum Settlement (LSS) for Claimant's signature. The LSS provides, inter alia, that the claim is settled on a disputed basis, and that Claimant indemnifies WC surety from all claims for past denied medical bills. In other words, Claimant is responsible for satisfying any claims for those bills. At the request of Attorney, the LSS allocates the settlement as follows: $30,000 for past disputed medical bills, $20,000 for future medical care, $250,000 for impairment/disability. Attorney seeks to take a 25% fee on the settlement, or $75,000, the amount that would typically be approved by the Commission on a case that settled before hearing. After inking the LSS, Attorney reaches out to the subrogated health insurer to deal with its interest. Attorney sends the subrogated carrier a copy of the defense expert's opinion that Claimant's condition is entirely unrelated to the work accident, but does not send the opinion of the treating physician who opined that the work accident caused the cervical spine injury. The subrogated carrier has not followed the case and accepts the representation that the case has minimal value based on the opinion of the defense doc. The subrogated carrier waives its right of subrogation. Under 72-404, the IIC may only approve a LSS where it appears that to do so would be in the best interests of the parties. Questions:

1. Attorney did not have agreement to represent subrogee, and subrogee was not up to speed on the case. What were Attorney's obligations to educate the carrier about all the facts of the case, and disclose the opinion of the treating doctor?

2. Was Attorney obligated to share terms of settlement with subrogated carrier, i.e. that claim was settled for 300K and resolved the issue of past disputed medical bills?
3. Attorney served his clients interests in beating down the subrogation claim, but did he also have a duty to subrogee? If so, is there a conflict of some type created by trying to maximize return to claimant while denigrating right of subrogation?
4. Struhs v. Protection Technologies, Inc., 133 Idaho 715, 992 P. 2d 164 (1999) establishes that Claimant and WC surety cannot attempt to prejudice rights of subrogee by characterizing settlement proceeds. Would it have been unethical to tell subrogee that it would never be entitled to more than 30K, because this was the sum assigned in the IIC approved LSS to resolve the past disputed medical bills of 200K?
5. What should Attorney have done differently to address subro issue? Should he have attempted to resolve subrogated interest before settling case with WC surety?
6. Suppose subrogee and Attorney agree that subrogee's interest is fairly valued at $100,000, but subrogee then refuses to pay atty a contingent fee on this recovery, relying on ERISA plan. Attorney (rightfully) believes that he is still entitled to 25% fee ($75,000) on the $300,000 settlement. Since subrogee refuses to pay, Attorney takes $75,000 fee off the $200,000 payable to Claimant. Therefore, claimant bears the burden of all attorney fees payable in the case, while subrogee bears nothing. Ethical?
7. Similar issue to 6 above is created where part of a WC settlement incorporates funding for Medicare set aside, as approved by CMS. Let's say

that settlement is for $300,000, $100,000 of which is to fund the CMS approved Medicare set aside. CMS has guidance in place which says that atty fee cannot be taken against the amount of the set aside; it must be fully funded. Attorney tries to take full $75,000 fee from the money payable to claimant. The Medicare set aside is for benefit of CMS, not claimant. It protects CMS from having to dip into its coffers to pay for medical care related to the work accident. And yet, it purports not to be liable to pay atty fees to the atty responsible for getting surety to knuckle under and fund the set aside. Any ethical problems with taking fee from the amount payable to claimant? In this scenario, claimant would bear responsibility for atty fee at effective rate of 38% versus the 25% he would normally pay. Any ethical problem with telling CMS to pound sand, and take fee from set aside, leaving it underfunded, even if it results in future exposure to Claimant for penalties.

B

Claimant hires Atty to represent him in connection with a WC claim in which the Claimant is highly invested. Discovery commences, experts are retained, and eventually the value of the claim begins to emerge. The case is set for mediation. There is the usual back and forth, but eventually Surety makes a final offer predicated on its view of what the proof will demonstrate. Atty doesn't disagree with Surety's valuation. Claimant attaches unrealistic value to claim, and won't be persuaded to take anything less. Hearing is in a couple of months. Questions:

1. What are Atty's obligations to claimant?
2. Must he proceed to hearing as directed by Claimant? Can he withdraw?

C

Atty is hired to represent Claimant in connection with work related knee injury. Surety has denied the claim. Case goes to hearing and Claimant prevails. Surety pays all benefits as ordered by the Commission, including past meds and disability. Atty is able to take a nice fee from the past and current benefits found owed to claimant. The Commission decision also establishes that Claimant has a right to future medical treatment related to the industrial accident. Years pass. Claimant eventually returns to Atty with an issue related to the award of future medical benefits; Surety has denied responsibility for the total knee replacement recommended for Claimant, the need for which Claimant's doctors relate to the original work injury. Surety, on the other hand, has obtained medical opinion supporting its denial. The matter will have to be tried in order for Claimant to get his surgery. Atty has no interest in this fight, mainly because he cannot see a way to get paid. If he succeeds, Surety will have to pay for the prospective surgery, but unless the Surety's denial was unreasonable (unlikely), there will be no award of atty fees under 72-804. Certainly, the doctor who will do the future surgery isn't going to share his fee with Atty. Atty has never withdrawn from the original case. Questions:

1. Does he have any obligation to the Claimant?
2. Can he withdraw over Claimant's objection?