QUESTION 1

Your client, Paul Plaintiff, is involved in four different disputes in which he wants to file a lawsuit. All persons and entities involved are Colorado residents.

The first dispute is between Plaintiff and Landscaping Company. Plaintiff hired Landscaping to install a sprinkler system at his home. The contract provided that Landscaping would install a sprinkler system for $20,000. As required by the contract, Plaintiff paid half the contract price, $10,000, before installation. Weeks have passed and Landscaping has not installed the sprinkler system. Plaintiff wants his $10,000 refunded. Landscaping refuses because Landscaping alleges that Plaintiff damaged their truck by backing into it. Landscaping claims that the damage to the truck is approximately $11,000. Plaintiff wants to sue Landscaping for the $10,000. If Plaintiff sues, Landscaping intends to counterclaim.

The second dispute is between Plaintiff and ABar Antiques. Plaintiff contracted with ABar to buy a wooden hutch for $4,000. After the contract was executed, ABar learned that the hutch was a rare piece of furniture valued at $20,000. ABar refuses to honor the contract price. Plaintiff wants to enforce the contract because he wants the hutch.

The third dispute is between Plaintiff and his wife. They have decided to file for divorce.

The fourth dispute is between Plaintiff and Kim, the nanny Plaintiff hired to care for his children. Plaintiff paid Kim $1,000, in advance, for the first month she was to serve as his children's nanny. Kim never showed up for work and has not returned Plaintiff's phone calls requesting that she return the money. Plaintiff wants his $1,000 back.

QUESTION:

Explain why the courts listed below do/do not have jurisdiction over the four lawsuits.

(a) The Colorado state district courts
(b) The Colorado state county courts
(c) The Colorado state small claims division of the county courts (small claims courts)
(d) The United States District Court for the District of Colorado (federal court)

Organize your answer into four separate parts, one for each dispute. Do not address the merits of any of the disputes or discuss venue.

QUESTION 2

Dennis the Dentist placed an advertisement offering to sell his old dentist chair for $500. The next week, Bob the Barber read the advertisement and later visited Dentist about purchasing the chair. Because Barber did not have enough cash to make the purchase, he offered Dentist $50 in cash and a $500 IOU. Dentist accepted this offer and Barber gave Dentist a signed note which read:

I, Bob the Barber, promise to pay Dennis the Dentist $500 on or before January 1, 2001.
/s/Bob the Barber
09/15/00

Dentist decided to go to his favorite watering hole to celebrate the sale. He ordered a drink from Bart the Bartender who owned the bar. Bartender refused to serve Dentist because Dentist had an overdue bar tab of $400. Dentist said to Bartender: "I have a $500 IOU from Bob the Barber. How about I give it to you and we forget about the bar bill?" Bartender agreed, and Dentist wrote on the back of the note: "Pay to the order of Bart the Bartender" and handed the note to Bartender.

That night, Bartender gathered the day's receipts, including the note, locked the doors of the bar, and headed for his car. When he approached his car, out from behind it jumped Thor the Thief. Thief demanded that Bartender hand over the bar receipts; Bartender did as he was told.

When Thief got home and sorted the loot, he noticed the note. He took the note to his cousin, Willie the Weasel, who agreed to pay Thief $100 in exchange for it. Thief signed Bartender's name on the back of the note and gave it to Weasel. On January 1, 2001, Weasel presented the note to Barber for payment. Barber refused to pay.

QUESTION:

Discuss the status, rights, and obligations of the parties.

QUESTION 3

For three years, Alexa and Bart lived on a farm which they owned in joint tenancy with right of survivorship. During her occupancy, Alexa refused to pay her pro rata share of the property tax bill. Bart paid the entire tax bill for those years.

Recently, Alexa signed and delivered a deed transfering all of her interest in the property to Xena. Xena properly recorded the deed and moved onto the farm. Shortly thereafter, Alexa died.

QUESTION:

Discuss:

1. Whether Alexa, before she sold the property, was responsible for any of the property taxes paid by Bart;

2. How the farm is currently owned and the rights of the respective parties; and

3. Whether Bart can obtain legal title to all, or a portion, of the farm.

QUESTION 4

Gator Amusements, Inc., ("Gator") is a for profit corporation formed under the laws of the State of Blue. Gator's articles of incorporation provide that Gator may engage in "any lawful business activity." Gator operates outdoor amusement parks and other "family friendly" amusement facilities in several states. Last year, legislation was introduced in the State of Blue which would legalize casino gambling. At that time, Chuck Chairman, Chairman of the Board of Gator, decided to study the possibility of Gator becoming the operator of a casino in Blue. Chairman asked Doug Director, who was on the Gator Board of Directors, to head up a feasibility study. Soon thereafter, Director submitted a report to Chairman recommending that Gator begin laying the ground work for building a casino. After reading the report, Chairman instructed Director to look for a casino site. Within weeks Director found what he thought was a suitable site and informed Chairman; Chairman instructed Director to buy the land. Director then began a long period of negotiation with the land owner.

During his visits to the potential casino site, Director noticed that the soil on the site was rich in potassium nitrate phosphate crystals. Director, a chemical engineer by training, knew that the presence of such crystals could mean only one thing - oil. Director did not tell anyone about what he found.

While Director was negotiating the purchase of the land on behalf of Gator, the state legislature voted down the gambling legislation. Chairman called Director and told him "the land deal is off, Gator isn't in the casino business." Director, practically smelling money, bought the land himself. Soon thereafter, Director had wells on the land pumping oil.

QUESTION:

Discuss what cause(s) of action, if any, Gator may have against Director.

QUESTION 5

The State of Density adopted a law requiring all commercial trucks using coastal highways to install special lights enabling drivers to see better in foggy conditions. This law was adopted pursuant to studies showing that fog in coastal areas is particularly dense and has been a cause of numerous accidents. The cost of installing these lights is insignificant and not an issue. Nor is there any argument with respect to whether the law is designed to promote safety. The National Trucking Association, on behalf of affected commercial truck drivers, has challenged the law on grounds that it is burdensome and only applies to commercial trucks. Association attorneys point out that commercial trucks are engaged in interstate commerce and are not the only type of vehicles involved in the type of weather-related accidents which prompted the state's action.

QUESTION:

Discuss any possible constitutional challenges to the Density law.

QUESTION 6

Pam lives in a new housing development in a well-to-do residential suburb. Contractor was hired by the owner of the lot adjoining Pam's home to construct his new home. In order to construct the foundation for the house, it was necessary to use explosives to remove rock which was very near the land's surface. Pam was not aware of the need to use explosives in the construction.

Contractor, who was properly licensed and bonded for the handling and use of explosives, exercised reasonable care in all relevant aspects of the construction. Nonetheless, an unexpectedly-strong concussion from detonation of the explosives caused serious structural damage to Pam's home.

QUESTION:

Discuss theories under which Pam may recover compensatory damages caused by the explosion.

QUESTION 7

Mike married Connie in 1997. At the time of their marriage, Mike had a seven-year-old son, Rey, born out of wedlock from a previous relationship. Mike has had little contact with Rey and was never legally determined to be Rey's father. Mike, nevertheless, has often sent Rey's mother money for Rey's support. Mike also has told Connie that he believes Rey is his son.

In 1998, Mike met with his attorney and prepared a will by which Mike gave one-half of his estate to his wife, Connie, and one-half to Rey. After Mike signed the will, Mike's attorney gave him the original and told him to store it in a safe place.

In 1999, Mike decided to revise his will. A new will was prepared by Mike's attorney in which Mike expressly revoked the 1998 will and left his entire estate to Connie. After Mike signed the new will, his attorney gave him the original, told him to store it in a safe place, and instructed him to immediately destroy the 1998 will. Mike took the new will home and placed it with the rest of his important papers, but failed to destroy the 1998 will.

A few months later, while sorting through his papers and files at home, Mike came across the 1999 will. Mistakenly believing that it was the 1998 will that he had revoked, he tore up the 1999 will and burned the pieces. There were no copies of the 1999 will, only the original.

In September of 2000, Mike died. At the time of his death, Mike owned a home, titled jointly with Connie, an automobile, also titled jointly with Connie, and an investment account in his name alone with a balance of $500,000 which he had accumulated prior to his marriage to Connie.

Connie was six months pregnant at the time of Mike's death, and gave birth three months later to a healthy daughter she named Marisa.

QUESTION:

Discuss how Mike's property will be distributed. Assume that the Uniform Probate Code is in effect in this jurisdiction.

QUESTION 8

Father's adult child, Son, was seriously injured in a car accident. Doctor, a licensed physician, who happened by the scene of the accident, found Son unconscious, treated him at the scene, and took him to his hospital. A few days later Father came to the hospital and told Doctor, "If you continue treating Son, I'll pay all of your fees, those for the services you have already rendered and those you will deliver to Son in the future." Doctor thanked Father and continued to treat Son until he died two days later, never having regained consciousness.

The reasonable value of Doctor's services before his conversation with Father was $3,000; the reasonable value of the services after their conversation and before Son's death was $2,000. Father has refused to pay for any of Doctor's services.

QUESTION:

Discuss:

1. any theories that Doctor may have to recover for his services against Son's estate and/or Father; and

2. the defenses which the Son's estate and/or Father may assert against Doctor's claim.

QUESTION 9

David is currently being tried for burglary and other related charges. He had gone to Victoria's house, entered through a basement window, and removed a computer and some files. David and Victoria are married, but in the middle of an acrimonious divorce and living apart. When he was arrested, David claimed that he was confused about whether the computer belonged to him or to Victoria.

Several weeks before this incident, David was arrested for embezzling money from his employer. In connection with that case, he was sent to the state mental hospital for a psychiatric evaluation and later was released. There was no report issued from that evaluation.

When attempting to impanel a jury for David's trial for the burglary, David's attorney used his first four peremptory challenges to excuse four women. When he attempted to utilize his fifth peremptory challenge to excuse another woman, the prosecutor objected, claiming that David's attorney had improperly exercised his peremptory challenges to reduce the number of women on the jury. David's lawyer explained that he wished to excuse the juror because she had indicated that she was divorced, and he had not had an opportunity to question her about the circumstances of her divorce.

After a jury was empaneled and David's trial had begun, Victoria testified about David's misconduct during the marriage, including his failure to make mortgage payments and pay their bills. On cross-examination, the defense learned that Victoria had made statements consistent with this testimony to the police when, prior to trial, she was questioned about the burglary. David's attorney moved for a mistrial on the ground that the prosecution had not disclosed the statements to the defense prior to trial.

QUESTION:

1. Assuming the trial judge knows about David's mental evaluation, discuss the appropriate action(s) she should take.

2. Discuss how the trial judge should rule on the prosecutor's objection and the standards which apply to these circumstances.

3. Discuss how the trial judge should rule on the motion for a mistrial.

DISCUSSION FOR QUESTION 1

General

There is no federal jurisdiction in any of the suits as all of the parties are Colorado residents and no questions of federal law are raised by the facts. Therefore, each of the four disputes can only be filed in the Colorado state courts. Colorado district courts are courts of general jurisdiction and have jurisdiction over all of the lawsuits Plaintiff wants to file. See §13-6-104, C.R.S. 2000.

A. Plaintiff's dispute with Landscaping

Plaintiff can file suit for a refund of the $10,000 down payment in either county court or district court. The county court and the district court have concurrent original jurisdiction in civil actions in which the amount claimed does not exceed $10,000, exclusive of interest and costs. See §13-6-104(1), C.R.S. 2000; County Court Rule 313(b).

The county court and district court also have concurrent jurisdiction in all actions in which the counterclaim does not exceed $10,000. Here, Landscaping's counterclaim could be for as much as $11,000. Therefore, Landscaping will need to make a choice regarding its counterclaim -- how much it decides to demand will determine whether Plaintiff's lawsuit stays in the county court. If Landscaping files a counterclaim, but limits its request to $10,000 or less, then the entire lawsuit will remain in county court. If Landscaping files a counterclaim in excess of $10,000, then it will have the right, but not the obligation, to request a transfer of the entire lawsuit -- including Plaintiff's claim – to the district court. Colorado County Court Rule 313(b)(2). To do so, Landscaping will need to include its request for transfer in its answer and counterclaim, plus it will need to pay the district court filing fee for a complaint. Colorado County Court Rule 313(b)(2). If Landscaping files a counterclaim in excess of $10,000, but fails to request a transfer properly, then the lawsuit will remain in county court and Landscaping's possible recovery will be limited to $10,000 (the county court's jurisdictional limit).

B. Plaintiff's dispute with Abar Antiques

Small claims courts are courts of limited civil jurisdiction where the claim amount cannot exceed $5,000. See §13-6-403, C.R.S. 2000. Even though the claim against Abar is for $4,000, small claims courts do not have jurisdiction over actions for specific performance (except as required to enforce restrictive covenants on residential property). §13-6-403(2)(e), C.R.S. 2000. Accordingly, the suit must be filed in either county court or district court.

C. Plaintiff's divorce

Neither county court nor small claims court has jurisdiction in dissolution of marriage proceedings. See §13-6-105(1)(c), C.R.S. 2000 (county court); §13-6-403(2)(a), C.R.S. 2000 (small claims court). Accordingly, the petition for dissolution of marriage must be filed in district court.

D. Plaintiff's dispute with Kim (the nanny)

Because the amount at issue in the dispute between Plaintiff and Kim does not exceed $5,000, his suit against her can be filed in small claims court. See §13-6-403(1). However, if he files suit in small claims court, he cannot be represented by an attorney; small claims courts do not have

jurisdiction over cases in which either party is represented by counsel. If an attorney enters an appearance on behalf of either Plaintiff or Kim, the case must be transferred to county court; however, even after such a transfer, it will continue to operate under small claims court rules.

Plaintiff can also file suit in either district court or county court; both have concurrent jurisdiction with the small claims court in all civil actions in which the damages requested do not exceed $5,000. See §13-6-403.

DISCUSSION FOR QUESTION 2

The IOU, signed by Barber, is a promissory note and a negotiable instrument. It is an instrument that is a (1) written, (2) signed, (3) unconditional (4) promise to pay, (5) a fixed amount of money (6) payable to the order of Dentist (7) at a definite time. U.C.C. § 3-104(a). Barber is the maker of the promissory note. U.C.C. §3-103(a)(5). Dentist is the payee on the instrument. U.C.C. §3-104(e).

The instrument was properly negotiated by special indorsement from Dentist to Bartender. U.C.C. § 3-205(a). Bartender is a holder in due course because he took the promissory note: (1) for value, (2) in good faith, and (3) without notice that it was overdue, had been dishonored, or was subject to a defense or claim by any party. U.C.C. § 3-302(a)(2).

Thief is neither a holder nor a holder in due course. In order to be a holder of an instrument, the person must have both (1) possession and (2) a right to enforce the instrument. U.C.C. § 3-301. Because Dentist signed the promissory note with a special indorsement naming Bartender as the payee, further negotiation of the promissory note could only be effected by Bartender affixing his signature to the back of the document (through indorsement). U.C.C. § 3-205(a). Although Thief had possession of the instrument, he had no right to enforce the promissory note without Bartender's indorsement, and thus could not be a holder. U.C.C. § 3-301.

Weasel is also neither a holder nor a holder in due course because he could not enforce the promissory note against Barber. U.C.C. § 3-301. Thief's forging of Bartender's signature breaks the chain of title and no subsequent possessor of the instrument (e.g. Weasel) can qualify as a holder or a holder in due course.

Because the chain of title has been broken, Dentist is within his rights to refuse to pay Weasel when the promissory note was presented for payment. Dentist also has no liability to Bartender because Bartender does not have possession of the promissory note. In order for Bartender to receive payment on the promissory note, he must be in possession and then present it to Dentist for payment.

DISCUSSION FOR QUESTION 3

Alexa is liable for half the property tax bill. "A co-tenant, not in sole possession, who pays more than his [or her] pro rata share of property taxes . . . has a right of contribution... ." Roger Cunningham, William Stoebuck & Dale Whitman, *The Law of Property* (2d ed. West 1993) § 5.9 at 216. Here, Bart and Alexa are joint tenants sharing possession of the farm. As joint tenants, they have a unity of interest; each owns an equal fractional share. Id. § 5.3 at 194. Therefore, Alexa and Bart each own a one-half share in the ranch and each is responsible for one-half of the property tax bill. See also *Powell on Real Property* (Lexis Publishing, 2000) §604(2).

Bart and Xena own the property equally as tenants in common. Although Bart and Alexa initially owned the ranch as joint tenants, which gave a right of survivorship to whomever survived the other, Alexa's transfer of her share to Xena severed her interest and defeated Bart's survivorship right. Such a transfer converted the joint tenancy into a tenancy in common held by Bart and Xena. *The Law of Property*, supra, § 5.4 at 199-200. At the time of Alexa's death, she held no interest in the ranch. Therefore, her death effected no change in ownership of the ranch.
Xena, as a co-tenant of the farm, has equal rights to occupy the farm with Bart. *Powell on Real Property* (Lexis Publishing 2000) §603(1) and (2).

As co-tenants, Bart and Xena can voluntarily agree to sever the ranch into two parcels, or agree to sell it and share the proceeds. *Powell*, supra at §607(2). If Xena is unwilling to agree to a voluntary partition, Bart can compel partition as a matter of right (as can any co-tenant, except for a tenant by the entirety). Id. § 5.11 at 222-23. Although equitable defenses to partition are sometimes available, no facts suggest that they would be appropriate here. *The Law of Property*, supra at § 5.11 at 223, n. 7. Partition can be in kind (a physical division of the property into two parcels), or by sale (selling the property and dividing the proceeds between the co-tenants). Although partition in kind has been traditionally favored, partition by sale is more common, because a fair and equitable physical division of property usually is impossible. Id.§ 5.13 at 230-31 and *Powell*, supra at §607(4).

DISCUSSION FOR QUESTION 4

Gator has a cause of action against Director for diversion of (or usurping) a corporate opportunity. A director has a fiduciary relationship to the corporation that he or she serves. U.S. v. Byrum, 408 U.S. 125 (1972); see also, generally, 18B *Am. Jur. 2d* § 1689. A director has both a duty of care and a duty of loyalty to the corporation that he or she serves. Id. at § 1695, 1711. The duty of care requires that a director exercise ordinary care and diligence. Id. at § 1695. The duty of loyalty requires that a director hold the interests of the corporation over his or her own interests. Id. at § 1711.

Arising out of the duty of loyalty is a director's obligation not to divert a corporate business opportunity for his or her own gain. Id. at § 1770. If a director diverts a corporate opportunity for his or her own gain, the director will be liable to the corporation for any profits that the director may have realized from the diverted opportunity. Id. at § 1774.

A threshold determination in deciding whether a director has usurped a corporate business opportunity is the determination of whether the "corporate opportunity" belonged to the corporation in the first place. This is a question of fact to be decided under the "interest or expectancy test," the "fairness test," and the "line of business test." Miller v. Miller, 222 N.W.2d 71 (1974). The interest or expectancy test and the fairness test are closely related. Both are equitable tests. The interest or expectancy test provides that a corporate officer or director may not acquire property or a business opportunity where the corporation has an equitable interest in such property or opportunity. 18B *Am. Jur. 2d* § 1779. The fairness test requires the fact finder to look at all of the underlying facts surrounding the business opportunity, including whether the director disclosed all material facts to the corporation and whether the director acted in good faith, in order to determine whether the business opportunity belongs to the corporation. Id. at § 1784. The line of business test provides that a business opportunity belongs to a corporation if the opportunity is logically and naturally adaptable to its business. Id. at § 1780. In deciding whether a corporate opportunity has been diverted, a court will generally look at all three of these tests in making its decision.

In the instant case, Director breached his duty of loyalty to Gator and diverted a corporate opportunity under the "interest or expectancy test," the "fairness test," and the "line of business" test. When Director began negotiating for the purchase of the land, he was clearly doing so on behalf of Gator. Gator was planning on opening a casino and therefore the purchase of the land was clearly within Gator's normal line of business. The fact that Chairman called off the land deal is irrelevant. Even though the gambling legislation failed, and Gator no longer needed the land, Director was aware of the value of the land and thus the purchase of the land remained a "corporate opportunity" belonging to Gator. Director's knowledge regarding the value of the land was obtained while acting on behalf of Gator. If Gator hadn't decided to look into opening a casino, and Chairman had not asked Director to look for a site for the casino, Director would probably never have located the land.

As noted above, the duty of loyalty requires Director to hold the interests of Gator over his own interests. Accordingly, Director had a duty to disclose the value of the land to Chairman. Director's failure to disclose this information was in bad faith and as such, under the fairness test and the interest or expectancy test, the opportunity to buy the land, even after the gambling legislation failed, remained with Gator. Director is liable to Gator for any profits derived from the land.

DISCUSSION FOR QUESTION 5

The challenge to this law initially presents a commerce clause claim. A non-protectionist state law that incidentally burdens interstate commerce is constitutional provided it addresses a legitimate state concern and does not impose a burden on interstate commerce that clearly exceeds the safety benefits. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). The state's police power provides it with a legitimate interest in regulating highway safety. Because a connection exists between foggy conditions and traffic accidents, the special lights enhance visual acuity, and it is conceded that the cost of compliance is not an issue, the burden does not appear to exceed the safety benefits attributable to the law. A commerce clause claim thus does not appear to be promising.

There is also an argument that commercial truckers are being discriminated against which raises an equal protection claim. By requiring only commercial truckers to bear the cost of the regulation, the state has created an economic classification. The standard of review under such circumstances imposes upon the plaintiff the burden of demonstrating that the classification has no rational relationship to a legitimate government interest. *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). If any plausible reason exists for the legislature's action, the "inquiry is at an end." *United States Railroad Retirement Board v. Fritz*, 449 U.S. 166, 179 (1980). It is not unreasonable to conclude that commercial trucks represent a class of vehicles that, because of their frequently greater impact in a collision, their numbers and effect on highway traffic, may be a particular regulatory concern. Even if the state's first stage response turns out to be the only stage of regulation, government has the freedom to address the problem on an incremental or piecemeal basis if it so chooses. *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 489 (1955). The equal protection claim thus appears to be no more compelling than the commerce clause argument.

DISCUSSION FOR QUESTION 6

The facts of the question are designed to steer applicants *away from* discussion of negligence, nuisance, or trespass to land and *toward* discussion of strict liability in tort for abnormally dangerous activity (as denominated by the Restatement (Second) of Torts) or ultrahazardous activity (the term used by the original Restatement of Torts) by declaring that Contractor, the only defendant referred to in the interrogatory, "exercised reasonable care in all relevant respects." The question limits applicants to discussion of Pam's right to recover compensatory damages from Contractor, thereby eliminating the need to discuss punitive damages or the rights or liabilities of the owner of the lot adjoining Pam's home.

The American Law Institute has restated the doctrine of strict liability in tort for abnormally dangerous activity in §§ 519-524A of the Restatement (Second) of Torts (1977). It appears that Colorado common law (1) recognizes the doctrine of strict liability in tort for abnormally dangerous or ultrahazardous activity; *Western Stock Ctr., Inc. v. Sevit, Inc.*, 195 Colo. 372, 578 P.2d 1045, 1050 (1978), *Ward v. Aero-Spray, Inc.*, 170 Colo. 26, 458 P.2d 744, 746 (1969); (2) might well apply the criteria of Restatement (Second) of Torts § 520 for determining whether an activity is abnormally dangerous or ultrahazardous; *Huddleston v. Union Rural Electric Assn.*, 841 P.2d 282, 290 n.10 (Colo. 1992), *Smith v. Home Light & Power Co.*, 734 P.2d 1051, 1053 and n.4 (Colo. 1987), *Lui v. Barnhart*, 1999 WL 626791 at *2 (No. 98CA1003, Colo. Ct.App. Aug. 19, 1999), *Walcott v. Total Petroleum, Inc.*, 964 P.2d 609, 614 (Colo. Ct. App. Aug. 20, 1998), *Hartford Fire Ins. Co. v. Public Service Co. of Colo.*, 676 P.2d 25, 27 (Colo. Ct. App. 1983), *but see, Cook v. Rockwell Intern. Corp.*, 181 F.R.D. 473, 486 (D. Colo. 1998) (applying less stringent requirements in determining abnormally dangerous activity).; and (3) would likely hold Contractor strictly liable for blasting damage on these facts, *Western Stock Ctr., Inc. v. Sevit, Inc.*, 195 Colo. 372, 578 P.2d 1045, 1050 (1978), *Garden of the Gods Village, Inc. v. Hellman*, 133 Colo. 286, 294 P.2d 597, 291 (1956), *Cass Co.-Contractors v. Colton*, 130 Colo. 593, 279 P.2d 415, 417-19 (1955), *Mannhard v. Clear Creek Skiing Corp.*, 682 P.2d 64, 65 (1983 (citing *Garden of the Gods Village, Inc. v. Hellman, supra*).

II. Elements of the Prima Facie Case

Plaintiff must establish duty and proximate cause, and thus foreseeability, to prevail on a claim of strict liability for abnormally dangerous or ultrahazardous activities. *Walcott v. Total Petroleum, supra.* As contrasted with negligence, the duty owed is an absolute duty to make safe the abnormally dangerous condition, and liability is imposed for any injuries to persons or property resulting therefrom. *Western Stock Center, Inc. v. Sevit, Inc.*, 195 Colo. 372, 379; 578 P.2d 1045, 1050.

Courts generally impose three requirements in finding an activity to be ultrahazardous:

1. The activity must involve a risk of serous harm to persons or property;
2. The activity must be one that cannot be performed without risk of serious harm no matter how much care is taken; and
3. The activity must not be a commonly engaged-in activity by persons in the community.

Cook v. Rockwell Intern. Corp., 181 F.R.D. 473, 486 (D. Colo. 1998).

The Restatement (Second) of Torts, which takes an approach followed by a minority of courts, additionally takes into accounts the value of the activity and its appropriateness to the location, declaring that, in determining whether an activity is abnormally dangerous, the following factors are considered:

(a) existence of a high degree of risk of some harm to the person, land or chattels of others;
(b) likelihood that the harm that results from it will be great;
(c) inability to eliminate the risk by the exercise of reasonable care;
(d) extent to which the activity is not a matter of common usage;
(e) inappropriateness of the activity to the place where it is carried on; and
(f) extent to which its value to the community is outweighed by its dangerous attributes.

Restatement (Second) of Torts § 520 (1977).

The American Law Institute notes that "[i]n determining whether the danger abnormal, the factors listed in Clauses (a) to (f) of this Section are all to be considered, and are all of importance" and that "[a]ny one of them is not necessarily sufficient of itself in a particular case, and ordinarily several of them will be required for strict liability." *Id.*, comment *f.*

An accurate and responsive applicant answer might plausibly make a good argument that each of the six factors cuts in favor of Pam, the plaintiff-client, as follows:

1. blasting in a residential suburb involves a high degree of risk of some harm to the person or property of others;
2. it is likely that any harm which results from such blasting will be great, as there are many expensive homes in the area;
3. as the present facts demonstrate, the exercise of reasonable care in blasting does not eliminate the risk;
4. blasting is not a matter of common usage because few people engage in that activity [see Restatement (Second) § 520, comment *i*];
5. blasting in a residential suburb is inappropriate to the place where it is carried on; and,
6. the value of such blasting is outweighed by its dangerous attributes.

In most states, including Colorado, the duty is owed only to "foreseeable plaintiff," that is, persons to whom a reasonable person would have forseen a risk of harm under the circumstances. The Restatement suggests that two types of persons are disqualified from using strict liability in tort for an abnormally dangerous activity: (1) "one who intentionally or negligently trespasses on land for harm done to him by an abnormally dangerous activity that the possessor carries on upon the land," Restatement (Second) of Torts § 520B (1977) and (2) one who is harmed because he or she is carrying on an "abnormally sensitive" activity, *id.*, § 524A. Pam falls under neither category and is thus a proper plaintiff in the sense that she is entitled to use the theory of strict liability in tort for abnormally dangerous activity.

The Restatement provides that "[o]ne who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another *resulting from the activity*." *Id.*, § 519(1)(emphasis added). Pam must thus establish a cause-in-fact relationship between Contractor's blasting and the structural harm to her home, which clearly exists under the facts because "an unexpectedly-strong concussion from detonation by Contractor of the explosives on the adjoining lot *caused* serious structural harm to Pam's home."

Though Restatement (Second) § 519 imposes strict liability, that strict liability "is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous." *Id.*, § 519(2). This proximate cause requirement is easily satisfied because Pam, a next-door-neighbor, suffered concussion damage to her property, which is probably the primary or most likely kind of harm, the possibility of which makes blasting in a residential suburb abnormally dangerous.

The Restatement (Second) permits recovery for "harm to the person, land or chattels of another," *id.*, §519(1), which clearly reaches the "serious structural harm to Pam's home." The harm must result from the kind of danger to be anticipated from the abnormally dangerous activity, that is, it must flow from the "normally dangerous propensity" of the condition or thing involved. In other words, strict liability has been confined to the consequences which lie within the extraordinary risk whose existence calls for such special responsibility. *Walcott v. Total Petroleum, Inc.*, supra.

DISCUSSION FOR QUESTION 7

UPC §2-507(a) explains that "a will or any part thereof is revoked: (1) by executing a subsequent will that revokes the previous will ... or (2) by performing a revocatory act on the will, if the testator performed the act with the intent and for the purpose of revoking the will." A revocatory act on a will includes destroying it. Id. Moreover, if a subsequent will that wholly revoked a previous will is thereafter revoked by a revocatory act, then the previous will remains revoked unless it is revived. Id. §2-509(a). A previous will is not revived unless it is evident from the circumstances of the revocation of the subsequent will, or from the testator's contemporary or subsequent declarations, that the testator intended the previous will to take effect as executed. Id.

As he intended, Mike revoked the 1998 will when he executed the 1999 will. Although this made it legally unnecessary to physically destroy the 1998 will, Mike attempted to do so, but instead destroyed the 1999 will. Because he destroyed the 1999 will by mistake, Mike did not intend to revoke the 1999 will. However, because the 1999 will is no longer in existence and cannot be produced, and there is no evidence that Mike intended to revive the 1998 will, the probate court will presume the 1999 will to have been revoked as well and will rule that Mike died intestate.

If Mike died intestate, his estate passes to his intestate heirs. See UPC §2-101. Connie, as Mike's surviving spouse, is an intestate heir. See UPC §2-102(4). Marisa also will be considered a surviving descendant of Mike even though she is an afterborn heir. Because she was in gestation at the time of his death, and lived more than 120 hours after her birth, Marisa is an intestate heir. See UPC 8.

To determine if Rey is a surviving descendant of Mike, it will be necessary to establish the parent-child relationship between them. UPC §2-114(a) provides that an individual is a child of his natural parents, regardless of their marital status. Section 4 of the Uniform Parentage Act, to which UPC §2-114(a) refers, permits a court to consider evidence that the putative father has supported and openly acknowledged the child as his own. Mike supported Rey by sending his mother money since Rey's birth and acknowledged to others that Rey was his son. Therefore, Rey likely will be considered a surviving descendant of Mike.

Mike's estate consists of those items of property to which there was no joint ownership. The home and automobile pass by right of survivorship to Connie as joint owner. See UPC §6-104. The investment account balance, which represents Mike's intestate estate, will be distributed according to UPC §2-102(4). Connie's share, as Mike's surviving spouse, will be the first $250,000, plus one-half of any of the remainder of the intestate estate, if one or more of Mike's surviving descendants are not descendants of Connie. As such, Connie will receive a total of $375,000, which represents the first $250,000, plus one-half of the remaining $250,000.

Pursuant to UPC §2-103(1), the remaining $125,000 will pass to Mike's descendants by representation. Both Rey and Marisa are Mike's surviving descendants, so they will share the balance remaining and will each receive $62,500.

DISCUSSION FOR QUESTION 8

Action against Son's estate.

If Doctor had treated Son at Son's request, there would have been an implied-in-fact contract between them; Son's request being an implied promise on his part to pay for Doctor's services. In this case, however, Son was unconscious throughout his treatment and could not have made a promise even by implication. There cannot be a contract without a promise. Restatement (Second) of Contracts §1; Farnsworth, Contracts, 2d Ed., 1990) §1.1, p. 3. Since Son made no promise, either express or implied, to pay Doctor, neither Son nor his estate has a contractual obligation to pay Doctor.

Early in the law of contracts, however, the courts developed an action whereby a plaintiff who had conferred a benefit on a defendant, without the defendant's request, could recover for the enrichment he had conferred upon the defendant. To reach this result, the courts imposed a promise on him to pay the reasonable value of the services that had been rendered. This was called quasi contract; it was not a contract because there was no promise to pay, but the plaintiff was allowed to use the contract enforcement procedure (the writ of general assumpsit) to recover the amount the defendant had been unjustly enriched. Restatement (Second) of Contracts §4, comment b; Farnsworth, Contracts, 2d Ed. (1990), §2.20.

Because Doctor was not acting gratuitously or officiously in treating Son, he meets the requirements for a quasi contract action and so is entitled to recover the reasonable value of his services from Son's estate under a quasi-contract theory. Cotman v. Wisdom, 83 Ark. 601, 104 S.W. 164 (1907); Farnsworth, Contracts, 2d Ed.(1990), §2.20, p. 105.

Action against Father.

A promise is not enforceable unless it is supported by consideration. Farnsworth, Contracts, 2d Ed. (1990), §2.2, p.43. Ireland v. Jacobs, 163 P.2d 203 (Colo. 1945). The Restatement defines consideration as an act, forbearance, or return promise bargained for and given in exchange for the promise. Restatement (Second) of Contracts §71. Father promised to pay Doctor both for the services rendered before he made his promise and for those rendered after his promise. In exchange for his promise he sought continued treatment of Son. Past services alone, however, cannot serve as consideration because they are not bargained for and given in exchange for the promise. Weston v. Livezey, 100 P. 404 (Colo. 1909). Mills v. Wyman, 20 Mass. (3 Pick.) 207 (1825). Had Father promised to pay only for past services, there would not be adequate consideration. But, because Father also promised to pay in exchange for future services, there was consideration for both the prior and future services. The past services here do not fall under the unjust enrichment exception to the bargained-for exchange rule because they were rendered to Son and not to Father. Restatement (Second) of Contracts §86.

The Restatement says that consideration is bargained for if it is "sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise." Id. at §71(2). It is clear, therefore, that Doctor's future services were bargained for in exchange for Father's promise to pay for all. The courts are not concerned about the adequacy of consideration. Casserleigh v. Wood, 119 F 308 (Colo. App. 1902). Embola v. Tuppela, 127 Wash. 285, 220 P. 789 (1923). This is true even though it is clear that the transaction is a mixture of gift and bargain. Restatement (Second) of Contracts §71, comment c. The fact that the services were rendered to Son rather than to Father is irrelevant; the consideration may move from the promisee to a third person. Spelts v. Anderson, 185 P. 468 (Colo. 1919). Restatement (Second) of Contracts §71, comment e. Neither is it necessary that the consideration be a benefit to Father

nor that Father is promising more than he is getting in return for his bargain. Restatement (Second) of Contracts §79(a), comment b and c. Thus, a defense of lack of consideration would most likely fail.

In this case, Father may try to argue that he is not liable for the prior and future medical services to the son because his promise was not in writing and, therefore, subject to the Statute of Frauds. The second clause of section 4 of the original English statute of frauds requires that a "special promise to answer for the debt, default, or miscarriage of another" must be in writing if it is to be enforced. Stat. 29 Car. 2, c.3, §4 (1677). This section has become part of the statutory law of almost every state and is commonly referred to as the "suretyship provision." Farnsworth, Contracts, §6.2 (1990). C.R.S. § 38-10-112. Father may claim that his promise to pay is merely an agreement to pay Son's medical debts and, therefore, must be in writing. Although Father is promising to pay for his son's treatment, it is likely that the court will interpret Father's promise to Doctor as "original" rather than "collateral," i.e., he is not promising to pay as a surety, but intends to assume the obligation as his own. It is not a promise "to answer for the debt of another," and, therefore, does not fall within the Statute of Frauds. City of Highland Park v. Grant-MacKenzie Company, 306 Mich. 430, 110 N.W.2d 270 (1962). Ideal Co, Inc. v. Funnin, 746 P.2d 69 (Colo. App. 1987). Farnsworth, Contracts, §6.3 (1990). Neither does his promise fall within any other section of the statute, and is not required to be in writing to be enforceable. Thus, a defense based on the statute of frauds also would fail.

Doctor would probably be entitled to recover $5,000 in a breach-of-contract action against Father. There was adequate consideration when the Father agreed to pay for past and future services in exchange for future services. In addition, the promise was an original obligation, not an agreement to pay his son's debt.

DISCUSSION FOR QUESTION 9

Question 1

Due process prohibits the trial of a defendant who is incompetent to stand trial. A defendant is competent to stand trial if, at the time of the trial, he is capable of understanding the nature and course of the proceedings against him and of participating and assisting in his defense and cooperating with defense counsel. Dusky v. United States, 362 U.S. 402 (1960). If there is evidence that a defendant may be incompetent, the trial judge has a constitutional obligation to conduct further inquiry and determine whether, in fact, the defendant is incompetent. Pate v. Robinson, 383 P.2d 375 (1966). There is, however, an initial presumption of competency. Once competency is raised, most states require a criminal defendant to prove that he is not competent to stand trial by a preponderance of the evidence. It does not violate due process to require the defendant to prove that he is incompetent. Medina v. California, 505 U.S. 437 (1992).

Here, the judge is aware that David had been sent to the state hospital for an evaluation in connection with the other case, and David claims that he was confused at the time of the offense about who owned the computer he took, there is no indication that he was incompetent at the time of trial. Thus, there is probably not enough evidence to give rise to a sufficient doubt of his competency at the time of the trial to require the court to suspend the proceedings and make a competency determination.

Question 2

In Batson v. Kentucky, 476 U.S. 79 (1986), the United States Supreme Court held that a prosecutor's use of peremptory challenges purposefully to eliminate prospective jurors on the basis of race is a violation of the equal protection clause of the Fourteenth Amendment. This holding was later extended to prohibit the exclusion of prospective jurors on the basis of gender. J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127 (1994). Here, although it is the defendant, not the prosecution, whose peremptory challenges are allegedly discriminatory, it is still unconstitutional to use peremptory challenges in a discriminatory manner. Georgia v. McCollum, 505 U.S. 42 (1992).

A trial court should follow a three-step process in evaluating claims of racial or gender discrimination in jury selection. Batson, supra; People v. Cerrone, 854 P.2d 178 (Colo. 1993). First, the party who made the Batson objection (here, the prosecution) must make a prima facie showing of purposeful discrimination. Such a showing can be made with facts or circumstances that raise an inference that the exclusion of potential jurors was based on race or gender. Second, if the requisite showing is made, the burden shifts to the party attempting to utilize the peremptory challenge (here, the defendant) to articulate a gender-neutral explanation for excluding the juror in question. The proffered reason need not be reasonable, as long as it is race or gender-neutral. Purkett v. Elem, 115 S.Ct. 1769 (1995). Third, if a neutral explanation is presented, the objecting party (here, the prosecution) should be given an opportunity to challenge the showing of neutrality. The trial court must then determine whether the neutral reason is a pretext for purposeful discrimination. People v. Cerrone, supra; People v. Saiz, 923 P.2d 197 (Colo. App. 1995), cert. denied, ___ U.S. ___, 117 S.Ct. 715, 136 L.Ed.2d 634 (1997).

Here, David's lawyer's pattern of striking women from the venire raises an inference of purposeful discrimination and satisfies step one of the Batson analysis of making a prima facie case of gender discrimination. The proffered explanation (that he had not questioned the juror about her

divorce and was concerned about the circumstances) is gender-neutral, and satisfies his burden at step two of the Batson analysis of presenting a gender-neutral reason for the peremptory challenge. The prosecution may challenge that reason, but it is the court which must decide whether the proffered reason is a pretext for gender-discrimination. A determination either way would be reasonable and not an abuse of discretion. It was arguably reasonable for defense counsel to be concerned about a juror who might also have gone through a hard-fought divorce.

Question 3

The prosecution has a duty to disclose material exculpatory evidence to the defendant. Brady v. Maryland, 373 U.S. 83 (1963). Failure to disclose such evidence violates the due process clause, and a conviction arising from a case where exculpatory evidence has not been disclosed will be overturned if "there is a "reasonable probability that, had the evidence been disclosed to the defense, he result of the proceeding would have been different." Kyles v. Whitely, 115 S.Ct. 1555 (1995); United States v. Bagley, 473 U.S. 667 (1985).

Here, because the information the prosecution failed to disclose was not exculpatory, there was no constitutional duty to disclose it. Moreover, there is no reasonable probability that had the Victoria's statements to the police been disclosed to the defense, the result of the trial would have been different. Her statements were not about the offense with which David is charged, and the information she provided was within David's knowledge. Thus, David cannot claim that he was surprised by the testimony. (Even if the prosecution had a duty to disclose the information, a mistrial would not be warranted because defendant was not prejudiced by the nondisclosure.)

21202

Essay 1 GradeSheet **Seat** ☐☐☐ **Score** ☐☐

Please use blue or black pen and write numbers clearly

Landscaping

1. The federal courts do not have jurisdiction. 1. _____

   1a. To have federal jurisdiction, there must be either a federal question, or diversity of jurisdiction and $75,000 or more in dispute. 1a. _____

2. The district court has jurisdiction. 2. _____

   2a. The district court is a court of general jurisdiction (with no limit on amounts in dispute). 2a. _____

3. The county court also has jurisdiction. 3. _____

   3a. The county court has jurisdiction to grant monetary relief up to $10,000. 3a. _____

   3b. Landscaping's counteroffer, which is far more than $10,000, raises an issue regarding the county court's jurisdiction limit. 3b. _____

   3c. Rules exist regarding Landscaping's ability to remove the entire case, including Plaintiff's claim, to district court. 3c. _____

4. The small claims court does not have jurisdiction. 4. _____

   4a. The small claims court has jurisdiction to grant monetary relief up to $5,000. 4a. _____

Abar Antiques

5. The small claims court does not have jurisdiction over claims for specific performance (injunctive relief). 5. _____

Divorce

6. Only the district court has jurisdiction over divorces. 6. _____

Nanny

7. The claim can be filed in all but the federal court. 7. _____

21321

Essay 2 GradeSheet **Seat** ☐☐☐ **Score** ☐☐

Please use blue or black pen and write numbers clearly

GENERAL

1. The IOU is a promissory note and as such, a negotiable instrument. 1. _____

2. An instrument is negotiable if it is a (a) written and signed, (b) unconditional promise (c) to pay a fixed amount of money to bearer, or to a designated person, (d) at a future/definite time. 2. _____

3. A holder is a person who has both possession and a right to enforce an instrument. (The note must be payable to bearer, or the person in possession.) 3. _____

4. A holder in due course is someone holder who takes an instrument (a) for value, (b) in good faith, and (c) without notice [that it is overdue, dishonored, or subject to a defense or claim by any party]. 4. _____

5. A special indorsement makes the note payable to a certain person. 5. _____

BOB BARBER

6. Barber is maker of note. 6. _____

DENTIST

7. Dentist is payee of note. 7. _____

BART BARTENDER

8. Bartender became a holder in due course when note indorsed to him. 8. _____

9. Past debt can serve as value. 9. _____

THIEF

10. Thief is neither a holder, nor a holder in due course. 10. _____

11. Thief did not take for value. 11. _____

12. Thief's forging of the indorsement breaks the chain of title; only Bartender could indorse instrument. 12. _____

WEASEL

13. Weasel also is neither a holder, nor a holder in due course. 13. _____

14. Barber is not obligated to pay Weasel on the note. 14. _____

21382

Essay 3 GradeSheet **Seat** ☐☐☐ **Score** ☐☐

Please use blue or black pen and write numbers clearly

1. A co-tenant in possession (Bart) has a right of contribution of a pro rata share of real estate taxes from the other co-tenant in possession (Alexa). 1. _____

2. Alexa's transfer to Xena ended the joint tenancy and Bart's survivorship interest. 2. _____

3. The transfer converted the joint tenancy into a tenancy in common between Bart and Xena. 3. _____

4. Bart and Xena have equal rights to use and occupy the farm. 4. _____

5. Bart and Xena can agree to a voluntary partition. 5. _____

6. If Xena is unwilling, Bart can compel a judicial partition as a matter of right. 6. _____

7. Partition can be in kind or by sale. 7. _____

8. Both Bart and Xena have equal obligation for taxes. 8. _____

21453

Essay 4 GradeSheet **Seat** ☐☐☐ **Score** ☐☐

Please use blue or black pen and write numbers clearly

1. A director has a fiduciary relationship to the corporations. 1. _____

2. A director has a duty of loyalty to the corporation. 2. _____

3. A director has a duty of care to the corporation. 3. _____

4. A director has an obligation not to divert a corporate opportunity. 4. _____

5. A director must disclose all material facts to corporation. 5. _____

6. A director must act in good faith. 6. _____

7. Was the opportunity within Gator's current line of business? 7. _____

8. Was the opportunity to corporation logically and naturally adaptable to its business. 8. _____

9. Director breached his duty of loyalty to Gator and therefore, he is liable to Gator for profits from the land. 9. _____

21551

Essay 5 GradeSheet **Seat** ☐☐☐ **Score** ☐☐

Please use blue or black pen and write numbers clearly

COMMERCE CLAUSE

1. Recognition of commerce clause issue. 1. _____
2. Recognition that law is non-protectionist. 2. _____
3. Law addresses a legitimate state concern. 3. _____
4. Burden is incidental (insignificant cost). 4. _____
5. Burden does not exceed safety benefits. 5. _____

EQUAL PROTECTION

6. Recognition of equal protection issue. 6. _____
7. Recognition of classification between commercial trucks and other vehicles. 7. _____
8. Recognition that rational basis test applies to equal protection issue. 8. _____
9. Recognition that law must be upheld if the facts indicate that a plausible reason exists for the law as written. 9. _____
10. Recognition that government may regulate on an incremental basis. 10. _____
11. Determination that a compelling basis does not exist for an equal protection challenge. 11. _____

21610

Essay 6 GradeSheet **Seat** ☐☐☐ **Score** ☐☐

Please use blue or black pen and write numbers clearly

1. Identification that strict liability in tort applies. 1. _____

   1a. in cases where there are abnormally dangerous or ultra-hazardous activities. 1a. _____

Three elements required in finding an activity to be ultrahazardous:

2. The activity must involve a risk of serious harm to persons or property; 2. _____

3. The activity must be one that cannot be performed without risk of serious harm no matter how much care is taken; and 3. _____

4. The activity is not commonly engaged in by persons in the community. 4. _____

Discussion of Scope of Duty

5. Abnormally dangerous or ultra-hazardous activity carries with it an absolute duty to make the activity safe to foreseeable plaintiffs. 5. _____

   5a. Pam, living next to site, was a reasonably foreseeable plaintiff. 5a. _____

   5b. damage from blasting was a reasonably foreseeable danger/risk. 5b. _____

6. Damages may be recovered for injuries caused by ultrahazardous activity. 6. _____

7. There were no intervening forces that would relieve Contractor of liability; in other words, Contractor's acts were the direct and proximate cause of the damage to Pam's house. 7. _____

42345

Essay 7 GradeSheet **Seat** ☐☐☐ **Score** ☐☐

Please use blue or black pen and write numbers clearly

Revocation of a will occurs when:

1. a subsequent will is executed, or 1. _____

2. a revocatory act is performed upon a will with intent to revoke (mistaken revocation is no revocation). 2. _____

3. The 1998 will was expressly revoked when Mike executed the 1999 will. 3. _____

   3a. A will remains revoked unless it is <u>intended to be revived</u>. 3a. _____

4. The 1999 will might not govern because there is no evidence of it; it no longer exists, or intent will be difficult/impossible to prove. 4. _____

5. Thus, the probate court likely will presume that Mike died intestate. 5. _____

6. Mike's estate consists of those items of property to which there was no joint ownership. Thus, Mike's investment account constitutes his entire estate. 6. _____

7. Because Connie was the joint owner of the home and automobile, these items pass to Connie by right of survivorship. 7. _____

8. Marisa will be considered a surviving descendant of Mike because she was in gestation at the time of his death and lived more than 120 hours after her birth, making her Mike's afterborn heir. 8. _____

9. Rey is likely to be determined to be an heir as well because an individual is a child of his natural parents, regardless of their marital status, or a parent-child relationship exists when there is evidence that the putative father has supported and openly acknowledged the child as his own. 9. _____

10. The intestate share of Connie will be an amount of the total off the top, plus one-half the remainder of the account because one or more of Mike's surviving descendants are not descendants of Connie. 10. _____

11. The remainder will pass to Rey and Marisa by representation. 11. _____

21686

Essay 8 GradeSheet **Seat** ☐☐☐ **Score** ☐☐

Please use blue or black pen and write numbers clearly

1. There can be no contract without a promise (an offer and acceptance). 1. _____

2. Son made no promise to pay Doctor for his services. 2. _____

3. Doctor may be able to obtain payment under theory of quasi contract to prevent unjust enrichment. 3. _____

4. A promise is not enforceable unless it is supported by consideration. 4. _____

5. Consideration is defined as an act, forbearance, or return promise bargained for and given in exchange for the promise. 5. _____

6. The promise to pay for past services cannot alone serve as consideration, because the services were not bargained for and given in exchange for the promise. 6. _____

7. The promise to pay for Doctor's future services is supported by consideration. 7. _____

   7a. Father need not have benefitted from Doctor's services; the consideration may move from the promisee to a third person. 7a. _____

   7b. Courts are not concerned about the adequacy of the consideration. 7b. _____

8. A promise to answer for the debt of another is within the Statute of Frauds and must be in writing. 8. _____

9. Here, Father's promise is an original promise, not a promise to answer for the son's debt, therefore it does not fall within the Statute of Frauds. 9. _____

10. The Doctor may assert that the Father is estopped from denying the existence of a contract because he reasonably relied upon the Father's statements. 10. _____

21741

Essay 9 GradeSheet **Seat** ☐☐☐ **Score** ☐☐

Please use blue or black pen and write numbers clearly

1. Issue spotting: competence 1. _____

2. Test of competence: capable of understanding the nature and course of the proceedings against him and of assisting in his defense and cooperating with defense counsel. 2. _____

3. Competence -- applies to the time of trial 3. _____

4. If there is evidence that a defendant may be incompetent, the trial judge has a constitutional obligation to conduct further inquiry and determine whether in fact the defendant is incompetent. 4. _____

5. Issue spotting: discriminatory use of peremptory challenges violates Constitution. 5. _____

6. Gender is constitutionally protected classification. 6. _____

7. Prohibition applies to both prosecution and defense. 7. _____

Three part test:

8. Prima facie showing of discriminatory purpose. 8. _____

9. Constitutionally neutral explanation. 9. _____

10. Pretext. 10. _____

11. Issue spotting: prosecution's disclosure of exculpatory evidence. 11. _____

12. Here, non-disclosure not outcome determinative. 12. _____