ESSAYS FROM SPRING 2011 CIVIL PROCEDURE II EXAM

ESSAY AND SHORT-ANSWER QUESTIONS

***There are two essay questions,
with suggested times of 61 and 45 minutes (106 minutes total).***

***There are two short-answer questions,
each with a suggested time of 10 minutes (20 minutes total).***

For both essays and short-answer questions, read the fact patterns and questions carefully before you begin to outline and write your answers. Pay close attention to the suggested completion times because the points allotted for each question proportionally correspond to the suggested time for that question. Also pay close attention to the instructions, because some of the questions build upon some facts found in previous essay/short-answer questions.

If you believe you have discovered an error in an essay or short-answer question, identify the error and resolve it in a reasonable manner. If you need to assume additional facts, state what those facts are and how they would affect your analysis. (But <u>do not</u> construe that as an invitation to <u>change</u> facts. Analyze matters under the facts presented and assume additional facts only where you believe them to be necessary.) Legibility and proper grammar are expected.

<u>For the essays</u>, please raise, discuss, and decide all issues presented by the call of the question, whether or not they are dispositive, and whether or not resolution of one issue makes discussion of other issues technically unnecessary.

<u>For short-answer questions</u>, the allotted time is limited, so you do not need to provide exhaustive analysis on ancillary matters. The questions are more narrowly tailored than one would expect from longer essay questions. Therefore, provide concise analysis on the core issue(s) presented. However, you are <u>still expected</u> to state relevant issues and rules, and to provide proper analyses and conclusions.

[Continued on next page]

QUESTION 1 (ESSAY OF 61 MINUTES):

ANGRY BARDS

Vikram Voldemartaj was born in Bangalore, India. After getting his college diploma in India in English Literature and Computer Science, Vikram moved to the San Francisco, California in 1998 to continue his studies. He hoped to get PhDs in both subjects, to work in California's famous "Silicon Valley" (near San Francisco) and to become a U.S. citizen. While studying, Vikram joined a small search engine company, Foogle, as employee # 12.

Around that time, the author J.K. Dowling published the first of her famous *Harry Totter* books. The books were about a group of teenage wizards and witches who battled an evil wizard named "Voldemart." Because Vikram's last name was "Voldemartaj," Vikram's new friends in California would often tease Vikram, calling him an "evil computer wizard." But Vikram never took offense to his friends' gentle teasing. In fact, Vikram was such a talented programmer that he understood the jokes to be a heartfelt complement about his programming skills.

The year 2005 was a good year for Vikram. First, Vikram completed his dual PhD. Second, Vikram obtained U.S. citizenship (and gave up his Indian citizenship). Third, Foogle "went public," making an initial public offering ("IPO") of stock for sale to the public. Because Vikram was an early Foogle employee, he had many stock options and the IPO made him rich. He bought a $5 million house in San Francisco overlooking the Pacific Ocean. He also bought a yacht that he kept docked in San Diego, California (in southern California).

By 2008, Vikram wanted a new challenge. Although he kept his United States citizenship, he wanted to help the community where he grew up, Bangalore, India. Vikram therefore sold all of his Foogle stock (getting $150 million!) and moved permanently back to Bangalore. He tried to sell his California home and yacht, but the collapse of the housing and financial markets made it impossible for Vikram to sell them. Vikram therefore decided to rent his California house and yacht to others until the market improved. Vikram's move was philanthropic, and also smart. Bangalore was growing fast, and was developing a fantastic reputation as the "Silicon Valley of India." Considering that the legal system of India, like the United States, was rooted in the tradition of the English common-law, Vikram felt comfortable starting a new business there. Vikram worked by himself and did not incorporate.

Back in the United States, the bad economy created a budget crisis in California that caused many to question the benefits of having such a large state. Therefore, in 2012, California split into two states: North California and South California. Both states were immediately admitted into the United States, making them the 50th and 51st states. Sacramento was made the capital of North California. San Diego was made the capital of South California.

In the meantime, Vikram's work in Bangalore was going very well. He wrote top-selling games for smartphones and tablets. These games were written for speakers of English and of Hindi (a major language in India). In 2013, Vikram wrote what would become his most famous game, *Angry Bards*. Although Vikram had never felt offended when people compared his last name to the infamous evil wizard Voldemart, he also felt that the *Harry Totter* books were not very good. Vikram therefore wrote the game for himself as a personal joke. In *Angry Bards*, all the great authors in history could get their revenge on less-deserving authors such as Dowling. The player could tap on the screen, and use a virtual slingshot to toss the heads of great writers – such as Shakespeare, Kafka, Vonnegut, and Joyce – at Dowling. Some of the writers had special powers. For example, the Shakespeare head would throw quills. The Kafka heads would turn into ravenous insects. The Vonnegut heads would turn into paralyzing ice. The Joyce heads, overflowing with streams of consciousness, would simply explode.

Because Vikram wrote *Angry Bards* for himself, he had no plans to release the game publicly. But one day, Vikram was visited in Bangalore by his good friend Steve Jobbs. Steve was the CEO of Opel Computer, Inc. Like Foogle, Opel Computer's corporate headquarters were in Silicon Valley (now part of North California). It was incorporated in Delaware. With Steve at the helm, Opel Computer had designed the most innovative electronic devices ever made, such as the GRANNYAPPLE computer, the MYPHONE touchscreen phone, and the MYPAD touchscreen tablet. In fact, Vikram had written some of the best-selling software applications for the MYPHONE and MYPAD, as well as many other devices from competing manufacturers.

Sitting on the terrace of his Bangalore home, Vikram showed *Angry Bards* to Steve. Steve loved the game and insisted that Vikram adapt it for the soon-to-be-released MYPAD 3. Like its predecessors, the MYPAD 3 was a touchscreen-based tablet computer. Unlike previous MYPAD devices, the MYPAD 3 was thinner and much less expensive. Like Opel Computer's other products, the MYPAD 3 would be sold nationally and internationally through Opel's hundreds of retail stores in all 50 states and many other countries, as well as through other national and international retailers. The machine would not be sold online.

Although Vikram declined Steve's offer, Steve was a persistent negotiator. He noted that the MYPAD 3 could be sold cheaply to help educate children in countries like India. Vikram therefore agreed to adapt *Angry Bards* for the MYPAD 3. The program would be included automatically on all MYPAD 3 devices, and Vikram would earn a royalty for each machine sold. Vikram told Steve that he wanted all of his royalties to be sent directly to foundations providing education in Bangalore.

Vikram had difficulties adapting *Angry Bards* to run on the MYPAD 3. The program was very graphics-intensive. Although the MYPAD 3 had a state-of-the-art graphics chip, Vikram could not get the program to run smoothly. Eventually, Vikram determined that he could "overclock" the graphics chip, making the chip to run five times as fast as it normally should. This made *Angry Bards* run perfectly. Vikram recognized that overclocking might make the touchscreen of the MYPAD 3 overheat if the program ran for over ninety hours straight. However, Vikram concluded that nobody would be foolish enough to play a game for that long.

He therefore emailed the completed program to Opel Computer. He did not tell Opel Computer about the risk that *Angry Bards* might overheat the MYPAD 3.

A few weeks later, on Sept. 10, 2013, the MYPAD 3 was offered for sale. The machine included *Angry Bards* as part of the included software. That very day, Professor N was in San Francisco, North California, for a law conference. Professor N was born in Pennsylvania, but had moved permanently to Florida in 2006 to join the faculty of a Florida law school. He was so excited to buy a MYPAD 3 that he waited in line all night at a San Francisco Opel Computer store to buy one. After getting his machine, Professor N turned it on. He was charmed by the *Angry Bards* game and spent the next four days playing it non-stop without sleeping. After his 92nd hour of playing the game, Professor N smelled something burning. He realized that the screen of the MYPAD 3 had become so hot that his *fingertips were burning off!*

In the days that followed, and with his fingers carefully bandaged, Professor N researched the MYPAD 3, *Angry Bards*, and the responsible individuals. He found the website for Vikram's business. The website was almost all in Hindi. The only page in English said that any questions about *Angry Bards* should be directed to Opel Computer. Professor N used an online translation tool to read the rest of the site, which contained a biography of Vikram's life, tips on how to play Vikram's games, and a text listing of games written by Vikram.

On Sept. 30, 2013, Professor N filed suit in a state court in Crescent City, North California (just south of the Oregon border). The complaint asserted two counts: negligence (Count I) and products liability (Count II) against both Vikram and Opel Computer. In conjunction with the complaint, Professor N filed documents attaching Vikram's house and yacht to the suit. Professor N demanded $1 million in damages plus whatever other relief the court might grant.
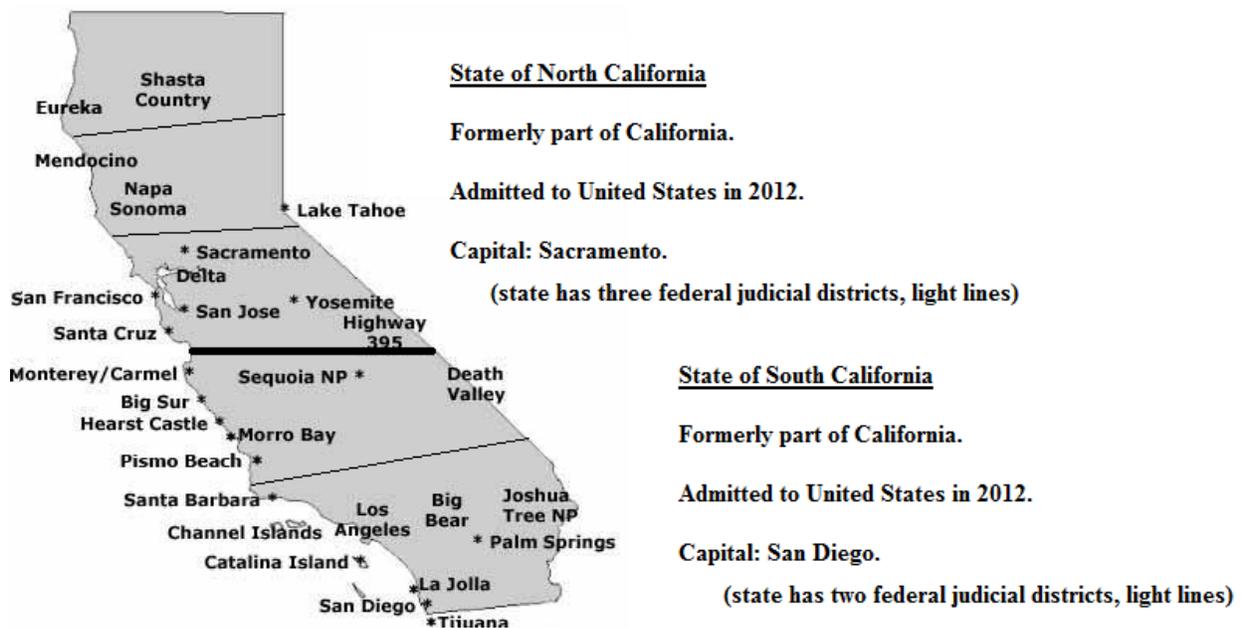
Opel Computer was served a few days after the suit was filed. Professor N realized, however, that serving Vikram might be more difficult. Luckily, Professor N read that Vikram would be speaking at a technology conference in Brookings, Oregon (just north of the North California border and about 25 miles north of Crescent City) on Oct. 10. While Vikram was speaking at the conference, he was served personally with the summons, complaint, and all papers relevant to the attachments.

ADDITIONAL INFORMATION FOR QUESTION ONE

1. The long-arm statute of the state of North California states: "A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States." N. Cal. Code of Civ. Proc. § 410.10.

2. The law of the state of North California further states that "An attachment of property may be issued in any action for the recovery of money brought against any of the following: (a) A natural person who does not reside in this state. . . ." N. Cal. Code of Civ. Proc. § 492.010.

3. Below is a map of the new states of North California and South California. The bold line in the middle shows the new boundary between the two states. The state of North California has three federal judicial districts:

- The United States District Court for the **Northern** District of North California (Eureka and everything north of that);
- The United States District Court for the **Middle** District of North California (from Mendocino to Lake Tahoe); and
- The United States District Court for the **Southern** District of North California (Sacramento and everything south of that, including Silicon Valley)

State of North California

Formerly part of California.

Admitted to United States in 2012.

Capital: Sacramento.

(state has three federal judicial districts, light lines)

State of South California

Formerly part of California.

Admitted to United States in 2012.

Capital: San Diego.

(state has two federal judicial districts, light lines)

Question: **You represent Vikram in the suit filed by Professor N. You plan to file a <u>motion seeking dismissal due to a lack of personal jurisdiction</u>. Assume that such a motion would be timely. Your assignment is to write a memorandum to your senior partner in preparation for the filing of the motion. Your memorandum should analyze <u>all</u> bases for personal jurisdiction (whether based on jurisdiction over person or property) that are <u>reasonably</u> raised by the facts, regardless of your conclusion for any particular basis. Thus, if multiple bases for personal jurisdiction are <u>reasonably</u> raised by the facts but only one of them (or some or none of them) is satisfied, discuss them <u>all</u>.**

QUESTION 2 (ESSAY OF 45 MINUTES):

This question builds on the facts of Question 1. Regardless of your conclusion to Question 1, assume that the court has denied Vikram's motion to dismiss for lack of personal jurisdiction. On February 4, 2014, Professor N voluntarily dismisses Opel Computer from the suit. That same day, the court grants Professor N leave to amend his complaint to add a third count against the remaining defendant, Vikram. Professor N immediate files and serves the amended complaint. Below are the relevant allegations from Count III.

<u>COUNT III (*per se* federal misconduct, against defendant Voldemartaj)</u>

42. Plaintiff Professor N repeats and realleges paragraphs 1-42 as if set forth fully herein.

43. As the creator of the game *Angry Bards*, defendant Voldemartaj owed users of that game a duty of care by exercising the degree of care, skill and diligence that ordinarily prudent programmers in like positions would use under similar circumstances.

44. "Overclocking" is the act of programming a computer chip to run faster than its recommended speed. Overclocking may cause the chip to overheat. Such overheating can burn the user of a device if the device does not provide a means to dissipate heat or insulate the user from the heat.

45. The Code of Federal Regulations, 47 C.F.R. 5.150(c)(2), prohibits alterations of computer chips without the permission of the Federal Communications Commission ("F.C.C."). Under Section 5.150(f), violations of Section 5.150(c)(2) permit only the F.C.C. to file an administrative action, seeking injunctions and penalties of up to $10,000 per violation.

46. Defendant Voldemartaj breached his duty and was negligent because the MYPAD 3 game *Angry Bards* overclocks the recommended speed of the MYPAD 3 graphics chip by a factor of five or more. Defendant's overclocking constitutes an alteration of a computer chip made without F.C.C. approval, in violation of Section 5.150(c)(2).

47. As a direct and proximate result of Defendant Voldemartaj's negligence, plaintiff Professor N suffered excruciating burns.

48. Defendant Voldemartaj's conduct constitutes negligence per se under the common law of the state of North California.

Question: **You still represent Vikram in the suit filed by Professor N. It is one day after service of the amended complaint. Can you properly remove the suit to the relevant U.S. federal district court?**

SHORT-ANSWER QUESTIONS

Questions 3 and 4 build on some of the facts from Questions 1 and 2. Below are additional facts relevant to Questions 3 and 4.

Helen Parr, who was born, raised, and still lived in Miami Beach, Florida, loved playing *Angry Bards*. Like others, Helen suffered fingertip burns. She filed suit against Opel Computer in the United States District Court for the Southern District of North California. She sued Opel Computer for negligence and products liability, seeking $100,000.

Question 3 (short-answer) (10 minutes):

Ten days after being served, Opel Computer filed a motion to dismiss for failure to state a claim. The motion was based solely upon an affidavit by Opel Computer CEO Steve Jobbs stating that *Angry Bards* author Vikram Voldemartaj never told Opel Computer that *Angry Bards* overclocked the graphics chip of the MYPAD 3. How should the Court rule and why?

Question 4 (short-answer) (10 minutes):

Regardless of your answer to Question 3, assume that Opel Computer's motion to dismiss for failure to state a claim was denied and that the case ultimately proceeded to trial. During the trial, Helen Parr put on no evidence that she was in any way harmed by the MYPAD 3 or *Angry Bards*. Regardless, the jury came back with a verdict for Helen in the amount of $120,000. Afterwards, Opel Computer moved for judgment as a matter of law, and in the alternative, for a new trial. How should the Court rule and why?