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CYA (Cover Your Apps!)

Mobile Apps and App Development Best Practices for Corporate Counsel

September 20, 2012

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Agenda

- Speakers
- Our Firm
- App Development
- Privacy & Your Company's App
- Apps for In-House Lawyers

Welcome

Christopher Hopkins
Shareholder
Litigation Practice Group

- Civil trial and appellate lawyer
- Focus: general civil litigation, commercial, construction, professional malpractice, and probate
- Handles social media, e-discovery, internet defamation, and reputation management issues
- Developed two law-related iPhone apps

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Welcome

Michael Marsh
Shareholder
Litigation Practice Group

- Extensive trial experience including various tribunals from administrative agencies to federal courts
- Focus: commercial lawsuits, including securities and other class action defense, accounting fraud, Ponzi schemes, D&O liability, professional liability, corporate transactions, corporate governance and compliance issues
- Admitted to practice in Florida & New York

Welcome

Brian Miller
Shareholder & Chair,
Securities Litigation Practice

- Chair, Securities Litigation Practice
- Focus: securities class action defense, internal investigations, accounting fraud, and directors' fiduciary duties
- Began career at the U.S. Securities & Exchange Commission
- Defended over 20 shareholder class actions, collectively seeking damages of over $1 billion
- Defended numerous SEC investigations

Akerman

Our Firm

Who We Are

- Leading national law firm, guiding clients swiftly through regulatory matters, transactions, and disputes
- Focused on our clients' critical challenges and opportunities unfolding across the U.S. and Latin America
- Known for our core strengths in middle market M&A, in the financial services and real estate industries, and for a diverse Latin America practice
- 500+ lawyers and government affairs professionals and a network of 19 offices

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Our Approach

- Intensely focused on innovating pragmatic, customized solutions to our clients' most complex legal challenges
- Provide clients with senior-level attention and strategizing
- Focused on getting business done swiftly
- Fully integrated teams with externally-focused thinking
- Well-being and success of our clients and their business is top-of-mind

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Corporate Practice Group

- Go-to law firm for middle market transactions, serving clients across the U.S. and Latin America from offices in New York, Washington, D.C., and Florida
- Nationally recognized, with a team that includes former SEC staff attorneys and former in-house corporate counsels
- Representing public and private companies, and private equity and other investment firms and their portfolio companies, in M&A, public and private securities offerings, financing, and other transactional matters, as well as corporate governance, securities compliance, and general corporate matters
- Akerman shareholders lead all engagements, with a track record of providing pragmatic, cost-effective solutions

Litigation Practice Group

- Nationally recognized by *US News-Best Lawyers*, in the Commercial Litigation category and as a national tier one law firm for International Arbitration and Real Estate Litigation
- Integrated team of trial lawyers, known for their experience in complex litigation and appeals including the handling of high profile, nationwide class actions, appeals and Ponzi schemes
- Known for our experience in key industries, including financial services, insurance, healthcare and real estate
- Team of appellate experts, including former appellate judges, Board Certified appellate lawyers, and former appellate court law clerks

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How We Can Help

- Advice and counsel involving public and private securities transactions including:
  - technology transactions
  - IP transactions & due diligence

- Full range of corporate law matters including governance issues, securities and M&A

- Advising companies on computer software licensing and internet legal issues

- Litigation avoidance, best practices to avoid common pitfalls

App Development Issues

App Development Issues

So You Want to Develop An App? Consider Your Audience:

- 50% of mobile phones are app-capable “smartphones” (Nielsen)
- 87% have “something to hide” on their phones (NQ Mobile)
- 53% use a phone password (NQ Mobile)
- 41 – average # of apps installed per phone (Nielsen)
- 54% of app users decided not to install an app due to privacy (Pew)
- 30% of users un-installed an app due to privacy (Pew)

App Development Issues

App Development Legal Pitfalls

- Contract with Platform (Apple / Google)
- Contract with Developer
- Terms of Service (EULA)
- Privacy Policy
- State & Federal laws (advertising)

App Development Issues

Three “levels” to an app:

- Operating system (platform) which operates the app
- Software developer kit / code which developer uses
- App icon

Your App’s Function?

- If it connects, contacts or interacts with someone or something, you need an agreement.
- What does it access on the phone or platform?

App Development Issues

Contract with Platform

- Your Company may be the Publisher (e.g., “iPhone Developer Program License Agreement”)
- Platform may reject for any reason (what are the review guidelines?)
- Platform may restrict other platforms (if you use their development software)
- Limited liability
- Platform’s ToS and Privacy Policy (aligned w yours?)
- *If you have an outside developer, make sure you have access to your platform account and have someone other than the developer who can remove app if there is a problem.*

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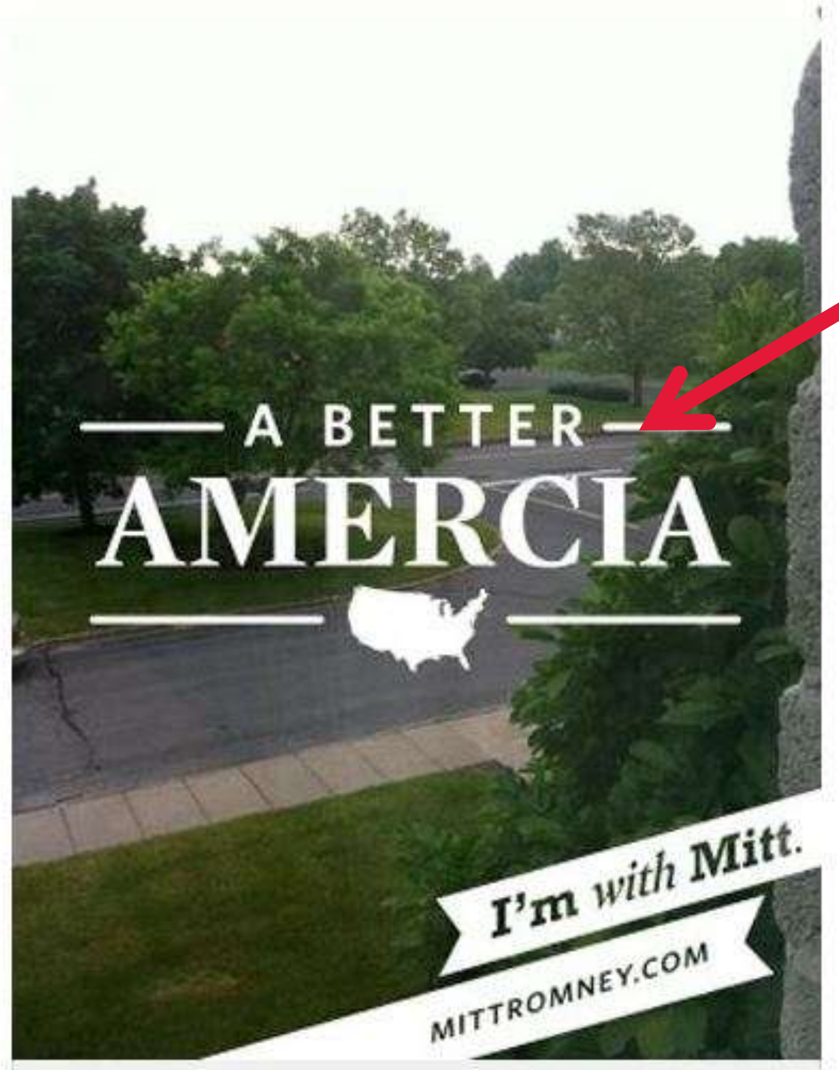
App Development Issues

Contract with Developer

- Written specifications; timetables
- Your IP ownership
- Control of user data
- Acceptance testing – before it goes live
- Copyright / patent infringement (where is developer getting its code? Beware the “patent troll”)
- Free and Open Source Software or GNU General Public license terms met?
- Support / maintenance
- *What is outcome if/when there are bad reviews or failures?*

App Development Issues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I'm with Mitt.
MITTROMNEY.COM

App Development Issues

Contract with Developer

- Often developer will retain tools, methods, processes, and elements of the app code (licensed to publisher)
- General company policy = website policy = app policy?
- ***"e" and "i" rule: don't let the technology confuse your good judgment; same laws still apply regardless of paper or pixel.***
- ***Lawsuit may never make you whole (plan ahead) – risk of contracting with emerging tech companies***

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App Development Issues

App issues (more interactive, more considerations)

- Age verification
- Mobility and scalability – tolerate large traffic?
- Security testing to find/fix vulnerabilities?
- QA stress testing?
- Does app access contacts, GPS, photos, UDID?

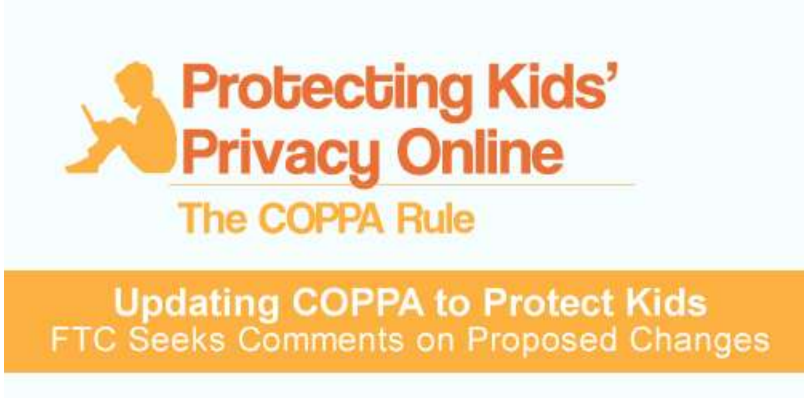
App Development Issues

Contract with Developer – look for these sections

- Term & Termination
- Development Services
- Compensation for Services
- Obligations of Developer
- Proprietary Rights
- Warranties
- Indemnification
- Confidentiality
- Insurance

Privacy & Your Company’s App

Privacy



Protecting Kids' Privacy Online

The COPPA Rule

Updating COPPA to Protect Kids

FTC Seeks Comments on Proposed Changes

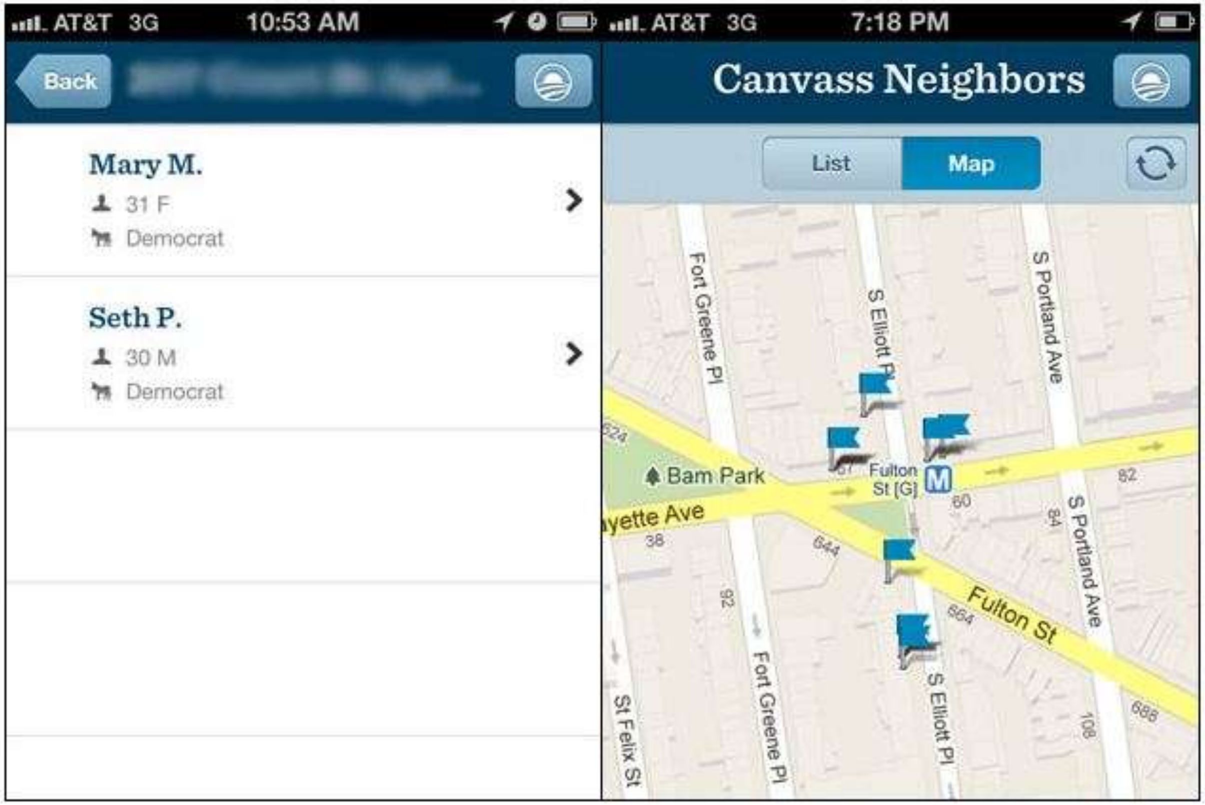
MARKETING YOUR MOBILE APP

GET IT RIGHT FROM THE START

FEDERAL TRADE COMMISSION | business.ftc.gov

Privacy

Is Your Neighbor a Democrat? Obama Has an App for That



Mary M.
31 F
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Seth P.
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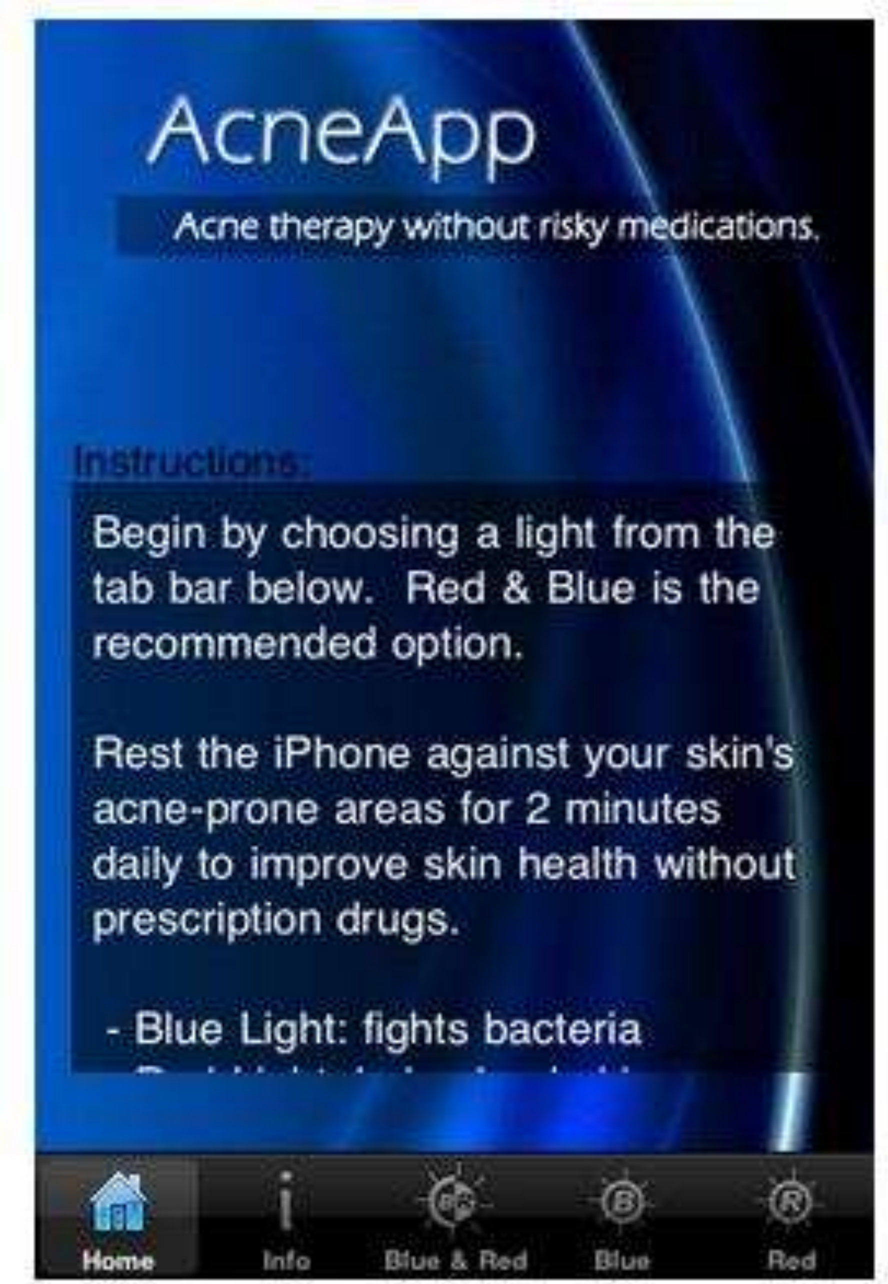
Truthful Advertising



AcneApp

Acne therapy without risky medications.

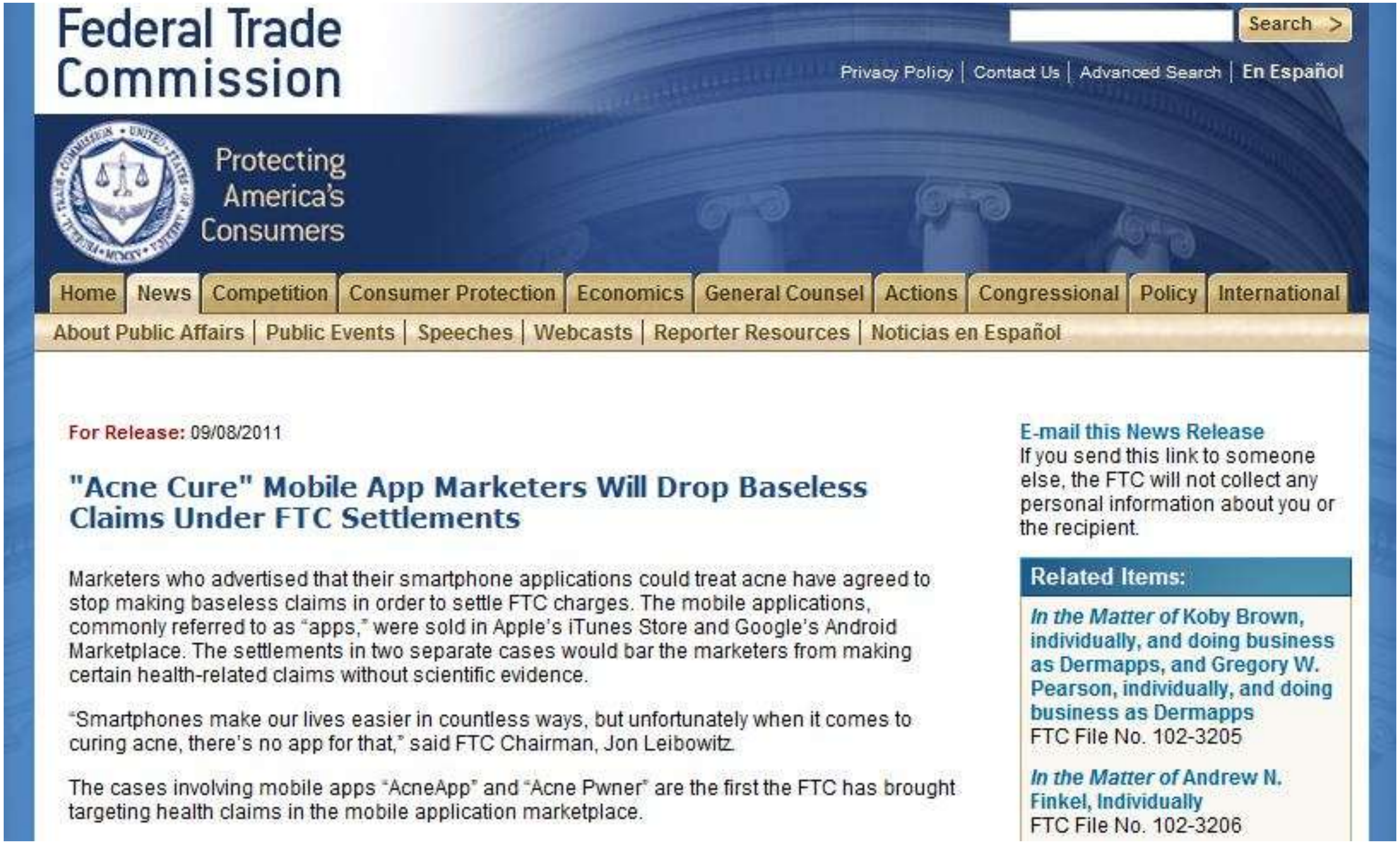
Instructions:

Begin by choosing a light from the tab bar below. Red & Blue is the recommended option.

Rest the iPhone against your skin's acne-prone areas for 2 minutes daily to improve skin health without prescription drugs.

- Blue Light: fights bacteria

Truthful Advertising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Protecting America's Consumers
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For Release: 09/08/2011

"Acne Cure" Mobile App Marketers Will Drop Baseless Claims Under FTC Settlements

Marketers who advertised that their smartphone applications could treat acne have agreed to stop making baseless claims in order to settle FTC charges. The mobile applications, commonly referred to as "apps," were sold in Apple's iTunes Store and Google's Android Marketplace. The settlements in two separate cases would bar the marketers from making certain health-related claims without scientific evidence.

"Smartphones make our lives easier in countless ways, but unfortunately when it comes to curing acne, there's no app for that," said FTC Chairman, Jon Leibowitz.

The cases involving mobile apps "AcneApp" and "Acne Pwner" are the first the FTC has brought targeting health claims in the mobile application marketplace.

E-mail this News Release
If you send this link to someone else, the FTC will not collect any personal information about you or the recipient.

Related Items:

In the Matter of Koby Brown, individually, and doing business as Dermapps, and Gregory W. Pearson, individually, and doing business as Dermapps
FTC File No. 102-3205

In the Matter of Andrew N. Finkel, Individually
FTC File No. 102-3206

Truthful Advertising

Tell the Truth About What Your App Can Do

- Website, App Store, App itself---MUST TELL TRUTH
- Once you DISTRIBUTE an app, you become an ADVERTISER
- Under the law, an ad is anything a company tells a prospective buyer or user – ***expressly or by implication*** – about what a product can do
- Avoid ***false or misleading*** claims, as well as the omission of certain important information
- One rule of thumb: Look at your product and your advertising from the perspective of ***average users***, not just software engineers or app experts

Truthful Advertising

You need solid proof to back up your app claims before you start selling

- The law calls that "***competent and reliable evidence***." If you say your app provides benefits related to health, safety, or performance, you may need competent and reliable *scientific* evidence
- For example, the FTC recently took action against developers who said their apps could treat acne, but who didn't have scientific evidence to back up their claims
- FTC Chairman, **Jon Leibowitz**, stated the obvious: While SmartPhones make our lives easier in countless ways, they unfortunately do not when it comes to curing **acne. THERE IS NO APP FOR THAT.**
- May seem silly to believe, but not when dealing with ***desperate teenagers***

Truthful Advertising

Disclose Key Information Clearly and Conspicuously

- If you need to disclose information to make what you say accurate, your disclosures have to be "***clear and conspicuous***"
- What does that mean?
- That they're big enough and clear enough that users actually notice them and understand what they say
- Generally, the law doesn't dictate a specific font or type size, but the FTC has taken action against companies that have buried important terms and conditions in ***long licensing agreements***, in ***dense blocks of legal mumbo jumbo***, or behind ***vague hyperlinks***
- Clear and conspicuous disclosures make good business sense

Litigation

False Advertising

- More communication necessarily means more opportunity for miscommunication and for misstatement about your app.
- This risk is exacerbated by breadth and speed of distribution in the social media marketing and sales channels.
- As a result, we may see a significant increase in False or Misleading advertising claims.

Litigation

False Advertising

Laws Relating to False Advertising Claims

- There is a well established body of law that governs false advertising claims
- Section 5 of the Federal Trade Commission Act
    - prohibits "unfair and deceptive acts or practices": exists if there is a material representation, omission or practice that is likely to mislead an otherwise "***reasonable consumer***.“
    - no actual harm or intent required.
    - FTC is free to make determinations based on its experience and judgment, rather than actual evidence in the marketplace.
    - advertiser generally bears the burden of substantiating the advertising claim.
    - permits monetary and injunctive relief
    - no private right of action at the FTC or in federal court under the FTC Act

Litigation

False Advertising (cont'd)

- National Advertising Division ("NAD")
  - self-regulatory body that resolves deceptive and misleading advertising claims
  - Indirect way for consumers and competitors to obtain a private right of action under the FTC Act
  - parties volunteer to proceed with the NAD to avoid potentially more consequential action of the FTC

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Litigation

False Advertising (cont'd)

- Section 43(a) of the Lanham Act
  - protects competitors against deceptive practices
  - relief is **NOT** available to consumers; for competitors
  - Some Circuits limit to "direct competition" (7th, 9th and 10th Circuits)
  - Others have a broader standing threshold that includes indirect competitors
  - civil actions by competitors for false or misleading statements made in advertising
  - covers failure to disclose only if such failure makes a statement "affirmatively misleading, partially incorrect, or untrue as a result of a failure to disclose a material fact."
  - brought in state or federal court (removal)
  - injunctive relief and monetary damages
  - not necessary to show actual harm or intent to deceive for injunction
  - must show deception and harm to recover damages

Litigation

False Advertising (cont'd)

- State Deceptive Practices Acts (*e.g.*, FUDTPA)
- Common law unfair competition claims

Truthful *Advertising*

- Emerging Area, but you can avoid trouble by following a few simple rules:
- Truth – Do not Stretch
- Even Implicitly
- Average User – Not Expert
- Competent & Reliable Evidence to Back-up Claims about your app
- For Health, Safety or performance – Reliable Scientific Evidence
- Clear & Conspicuous

- PRIVACY

Privacy

Build Privacy Considerations in from the Start

- The FTC calls this “privacy by design”
- What does it mean?
- Incorporating privacy protections into your practices, limiting the information you collect, securely storing what you hold on to, and safely disposing of what you no longer need
- Apply these principles in selecting the default settings for your app and make the default settings consistent with what people would expect based on the kind of app you’re selling
- For any collection or sharing of information that’s not apparent, get users’ express agreement - that way your customers aren’t unwittingly disclosing information they didn’t mean to share

Privacy

Be Transparent About Your Data Practices

- Even if you need to collect or share data so your app can operate, be clear to users about your practices
- Explain what information your app collects from users or their devices and what you do with their data
- For example, if you share information with another company, tell your users and give them information about that company's data practices

Privacy

Offer Choices That Are Easy to Find and Easy to Use

- Give your users tools that offer choices in how to use your app – like privacy settings, opt-outs, or other ways for users to control how their personal information is collected and shared
- It’s good business to apply the “clear and conspicuous” standard to these choice mechanisms, too
- Make it easy for people to find the tools you offer, design them so they’re simple to use, and follow through by honoring the choices users have made

Privacy

Honor Your Privacy Promises

- “But we don’t make any promises” Think again and reread your privacy policy or what you say about your privacy settings
- Chances are you make assurances to users about the security standards you apply or what you do with their personal information
- At minimum, app developers – like all other marketers – have to live up to those promises

Privacy

- What if you decide down the road to change your privacy practices?
- You'll need to get users' affirmative permission for material changes. Just editing the language in your privacy policy isn't enough in those circumstances
- While you're taking another look at your privacy promises, read them with users in mind. Is the language clear? Is it easy to read on a small screen? Are you using design elements – color, fonts, and the like – to call attention to important information?

Privacy

Protect Kids' Privacy

- If your app is designed for children or if you know that you are collecting personal information from kids, you may have additional requirements under the Children's Online Privacy Protection Act (COPPA) and the FTC's COPPA Rule
- Specifically, under COPPA, any operator whose app is directed to kids under age 13 or who has actual knowledge that a user is under 13 must clearly explain its information practices and get parental consent before collecting personal information from children
- App operators also must keep personal information collected from children confidential and secure

Privacy

Keep User Data Secure

- At minimum, you have to live up to the privacy promises you make
- But what if you don’t say anything specific about what you do with users’ information?
- Under the law, you still have to take reasonable steps to keep sensitive data secure
- One way to make that task easier: If you don’t have a specific need for the information, don’t collect it in the first place

Privacy

Be Aware of These Privacy Laws

- Children’s Online Privacy Protection Act (COPPA)
- CAN-SPAM Act
- State privacy laws
- Breach of Contract (do not violate your own ToS)
- Video Privacy Protection Act (VPPA)

Privacy

Conclusion / Good Practices:

- Review FTC “Marketing Your Mobile App”
- Terms of Use and Privacy Policy (have one)
- Conspicuous (where in app? Consider screen size)
- “e” and “i” rule: don’t let the technology confuse your good judgment; same laws still apply regardless of paper or pixel

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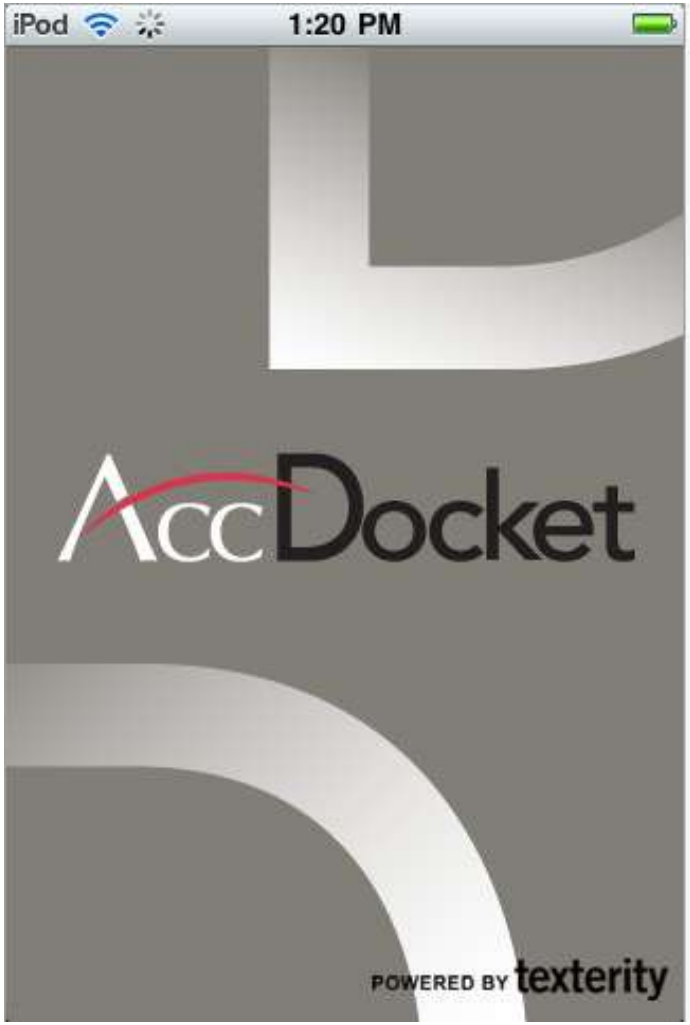
Apps for
In House Lawyers

ACC Docket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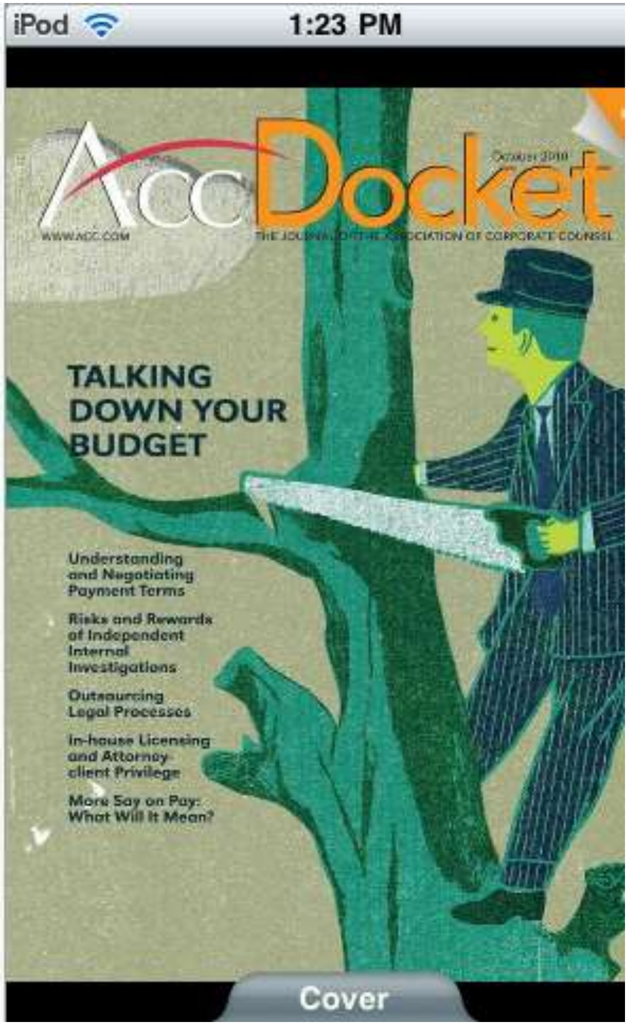
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AccDocket
October 2010
WWW.ACC.COM
THE JOURNAL OF THE ASSOCIATION OF CORPORATE COUNSEL
TALKING DOWN YOUR BUDGET
Understanding and Negotiating Payment Terms
Risks and Rewards of Independent Internal Investigations
Outsourcing Legal Processes
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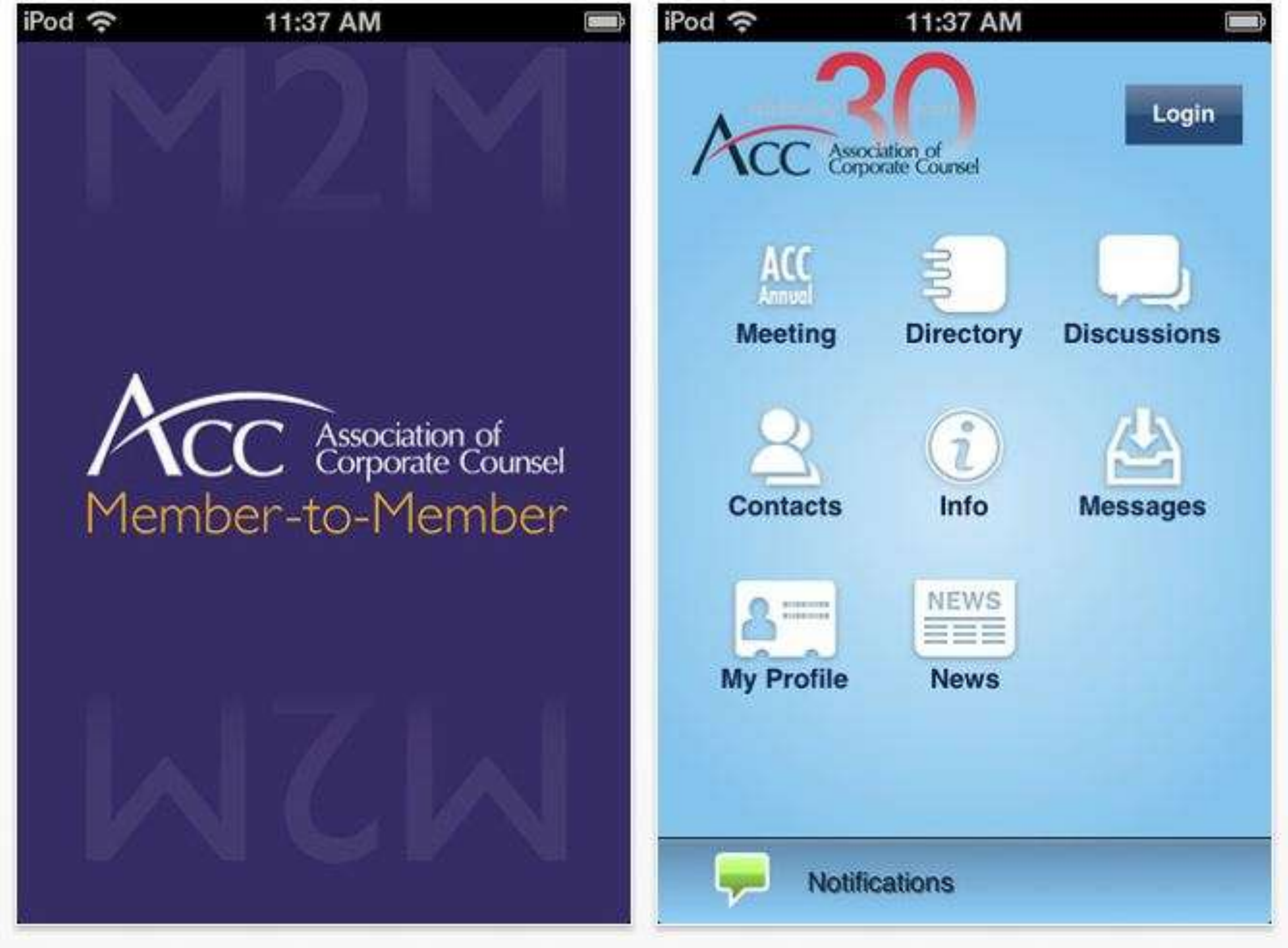
More Say on Pay: What Will It Mean?
Cover

ACC Member-to-Member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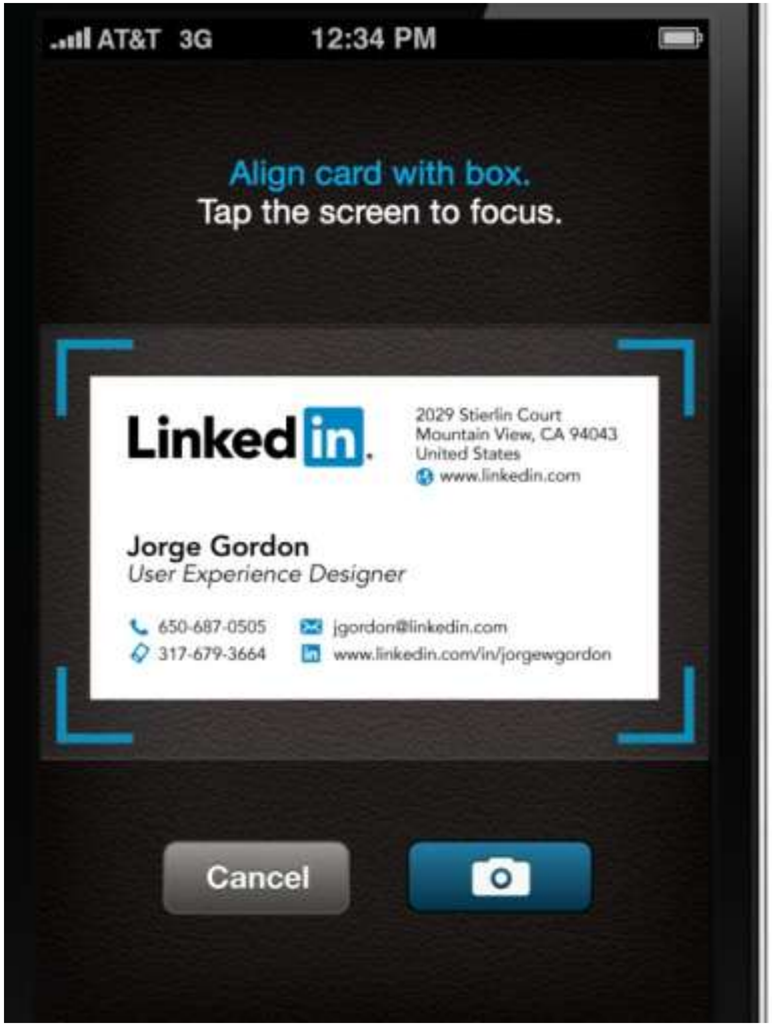
AT&T 3G
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Align card with box.
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Mountain View, CA 94043
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User Experience Designer

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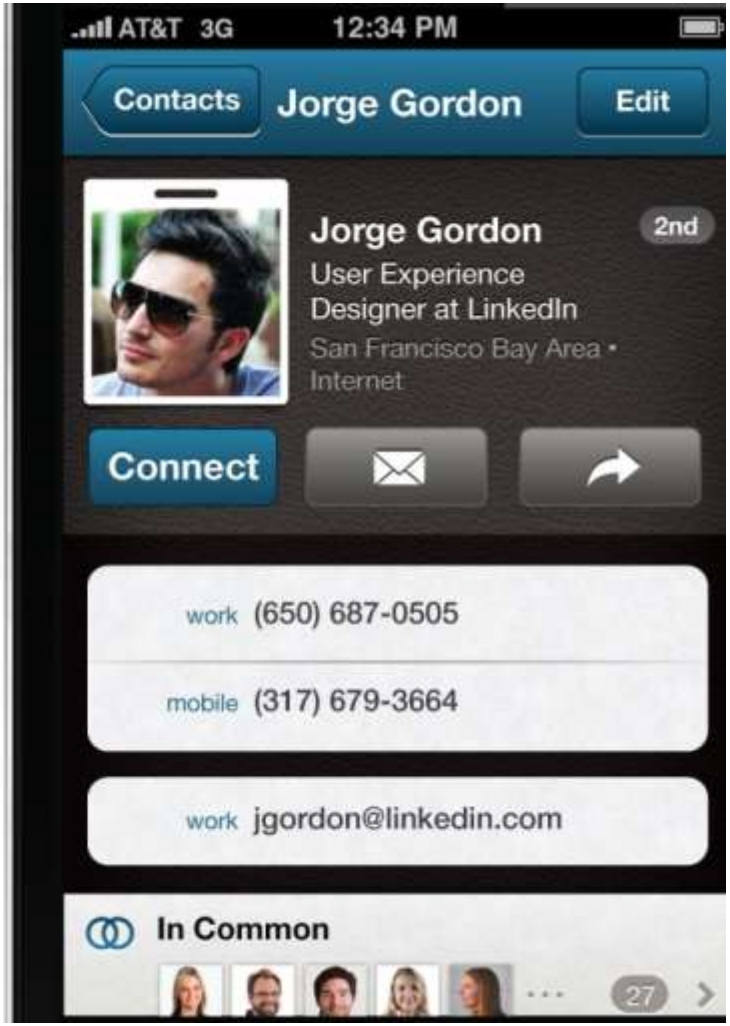
Cancel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Contacts
Jorge Gordon
Edit

Jorge Gordon 2nd
User Experience Designer at LinkedIn
San Francisco Bay Area • Internet

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work (650) 687-0505
mobile (317) 679-3664
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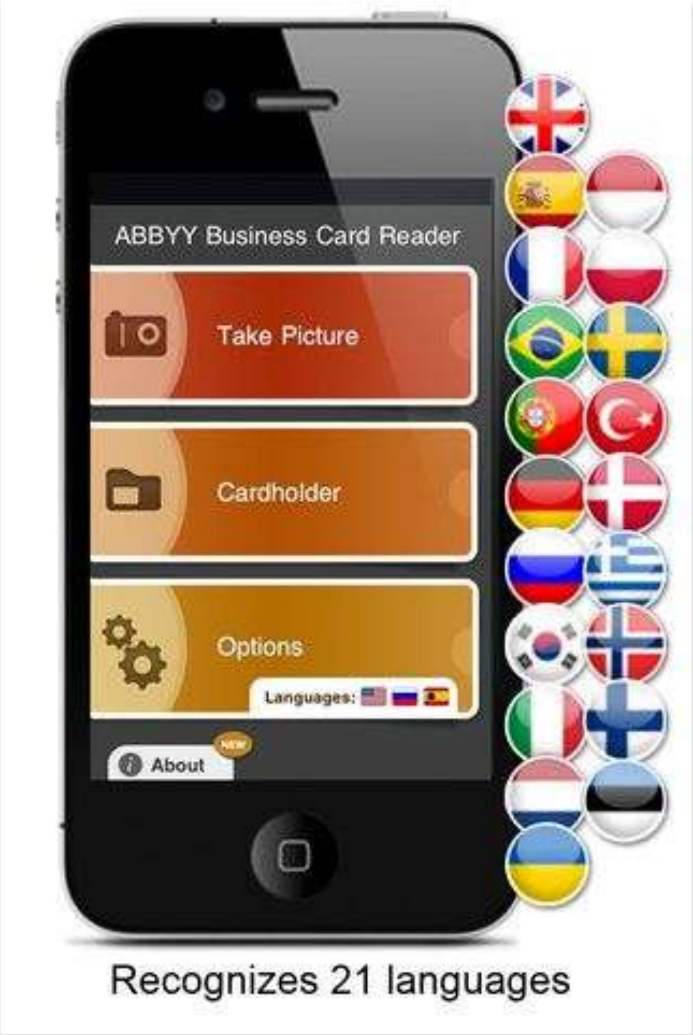
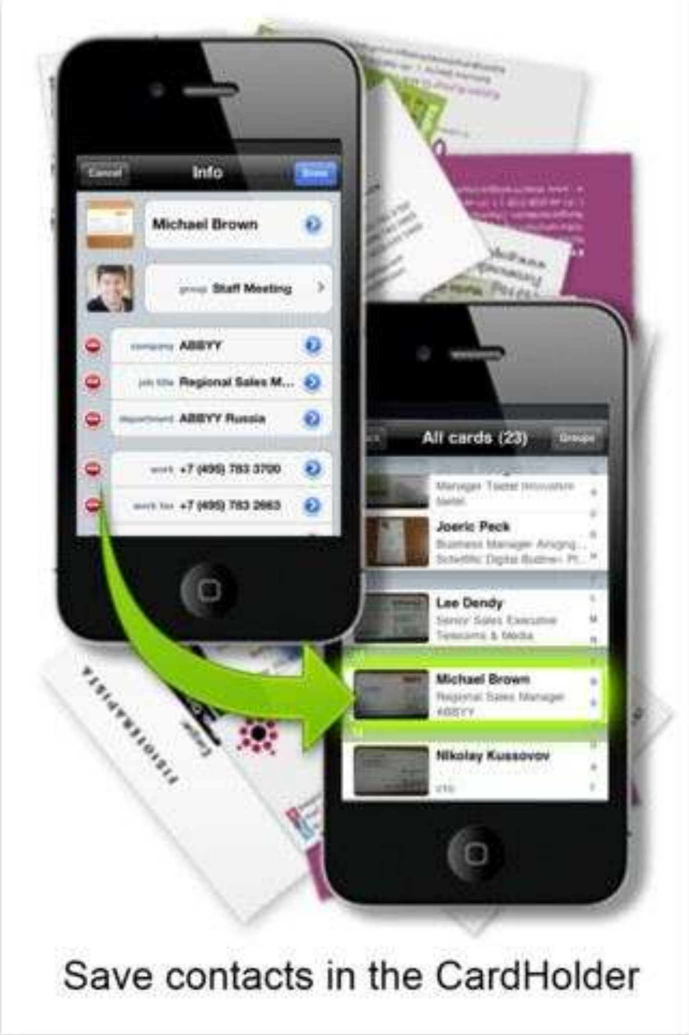
In Common
27

ABBYY Business Card Reader


ABBYY Business Card Reader
Take Picture
Cardholder
Options
Languages:
NEW
About

Recognizes 21 languages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Groups

Michael Brown
group Staff Meeting
company ABBYY
job title Regional Sales M...
department ABBYY Russia
work +7 (495) 783 3700
work fax +7 (495) 783 2663

Joeric Peck
Lee Dendy
Senior Sales Executive
Telecoms & Media
Michael Brown
Regional Sales Manager
ABBYY
Nikolay Kussovov

Save contacts in the CardHolder

PhotoSynth

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PhotoSynth

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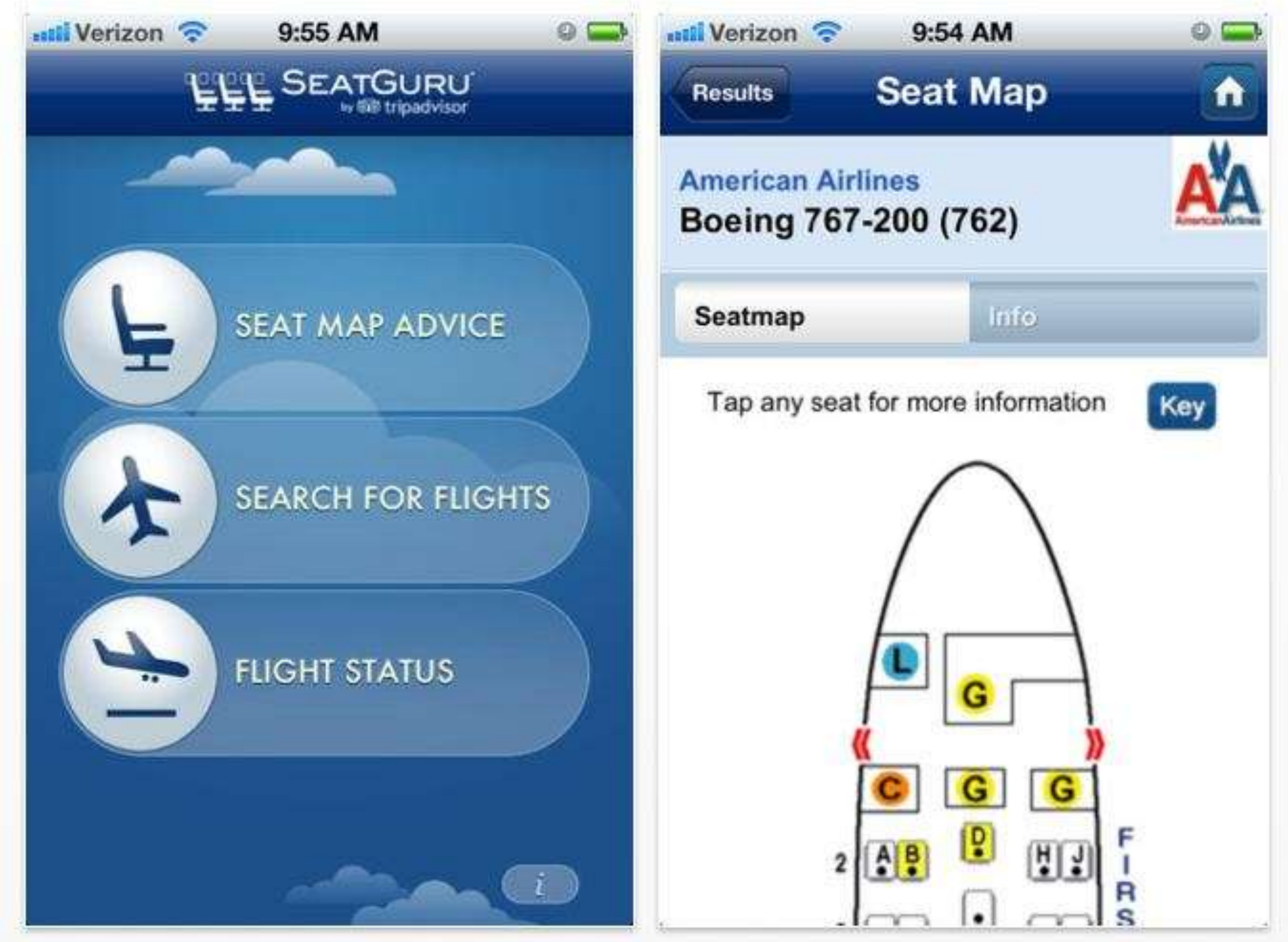

Verizon 9:55 AM
SEATGURU by tripadvisor
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American Airlines
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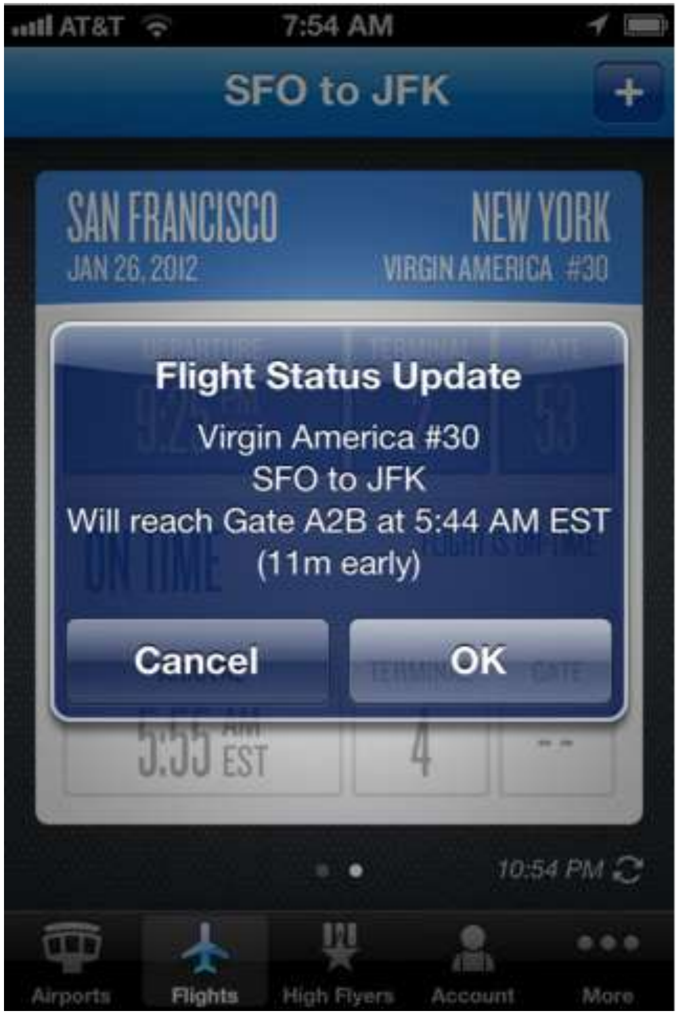
GateGuru



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Flight Status Update

Virgin America #30
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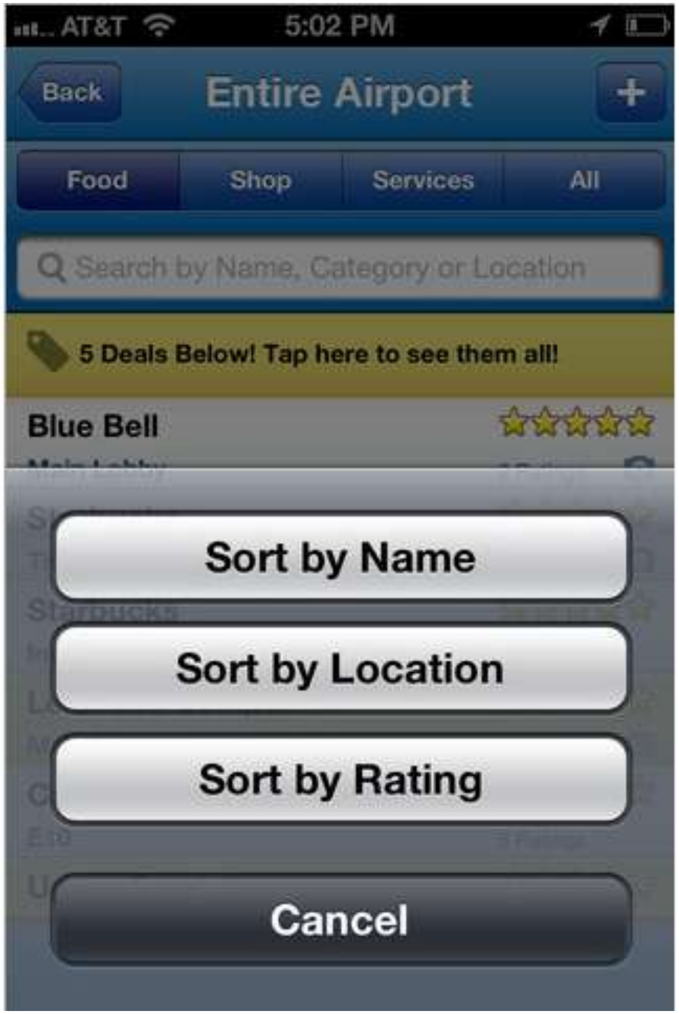

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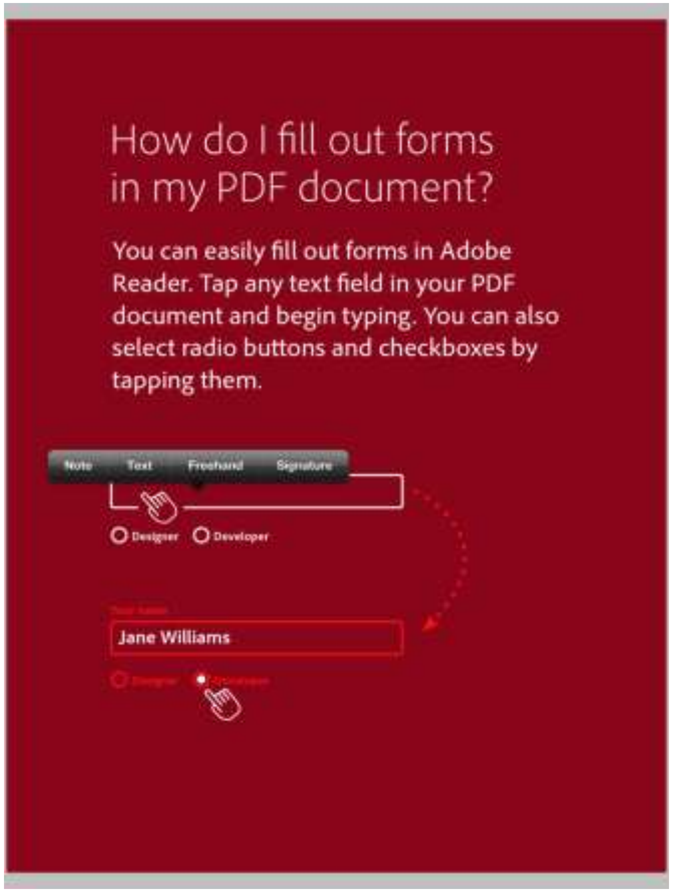
5 Deals Below! Tap here to see them all!

Adobe Reader

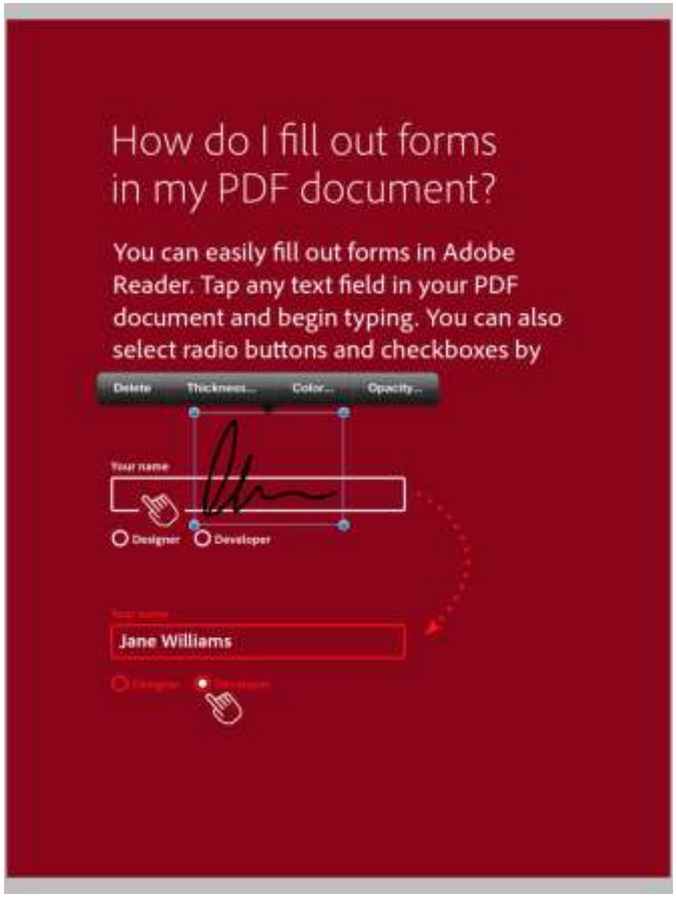


How do I fill out forms in my PDF document?

You can easily fill out forms in Adobe Reader. Tap any text field in your PDF document and begin typing. You can also select radio buttons and checkboxes by tapping them.

Note
Text
Freehand
Signature
Designer
Developer

Jane Williams



How do I fill out forms in my PDF document?

You can easily fill out forms in Adobe Reader. Tap any text field in your PDF document and begin typing. You can also select radio buttons and checkboxes by

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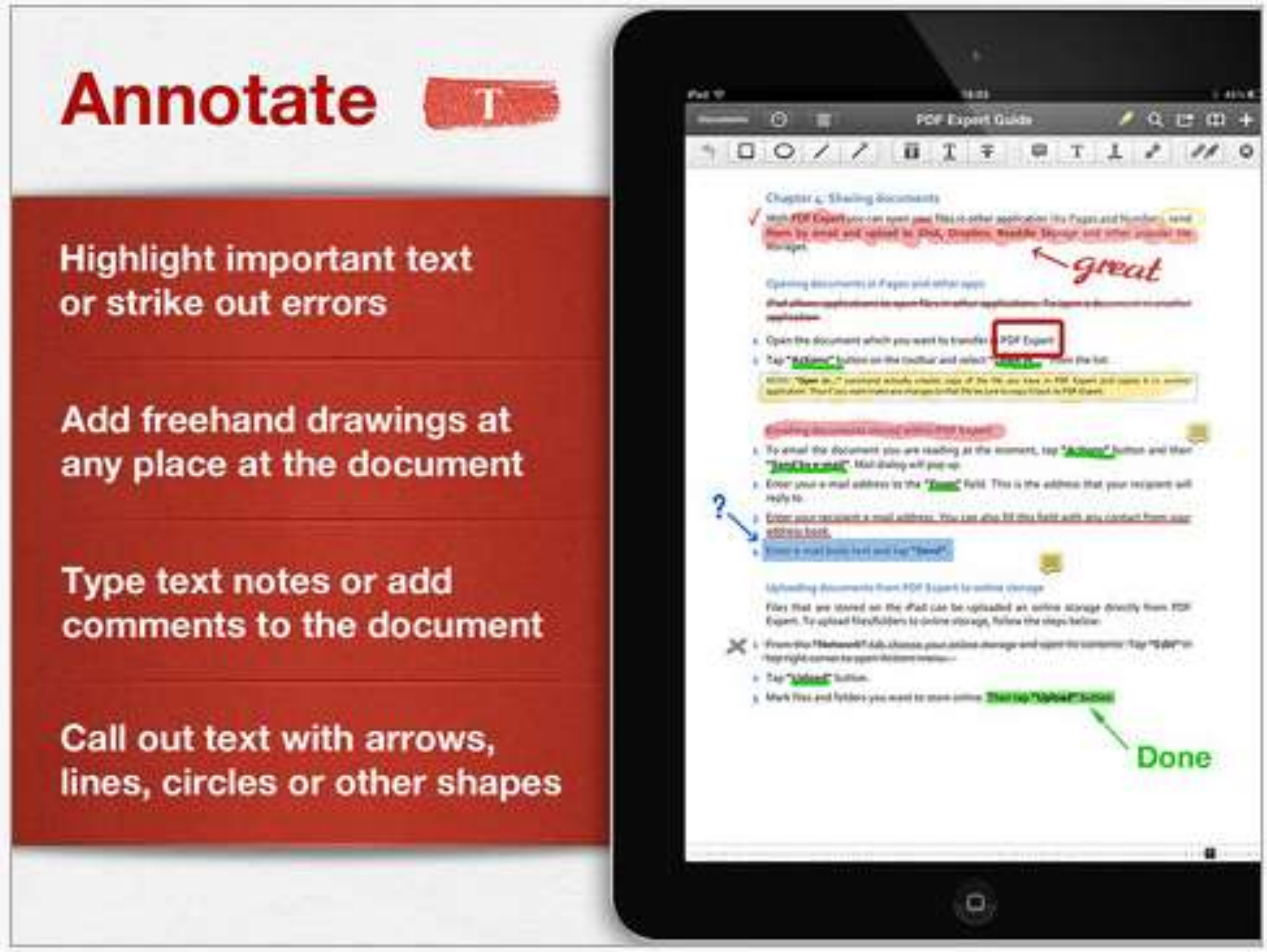
Developer

Jane Williams

PDF Expert



Annotate

Highlight important text or strike out errors

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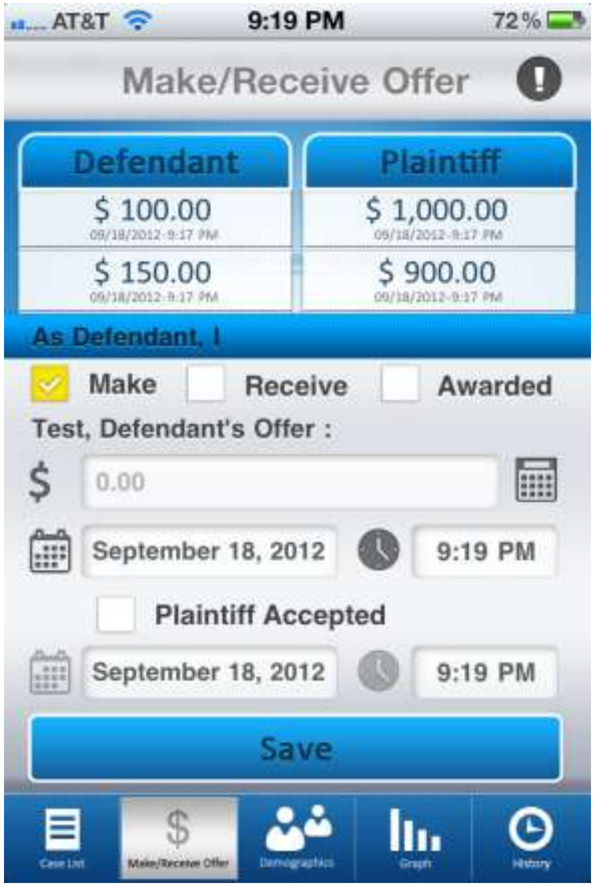

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Make/Receive Offer

Defendant	Plaintiff
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$ 150.00 09/18/2012 9:17 PM	$ 900.00 09/18/2012 9:17 PM

As Defendant, I

☑ Make ☐ Receive ☐ Awarded

Test, Defendant's Offer :

$ 0.00

September 18, 2012 9:19 PM

☐ Plaintiff Accepted

September 18, 2012 9:19 PM

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Case List
Make/Receive Offer
Demographics
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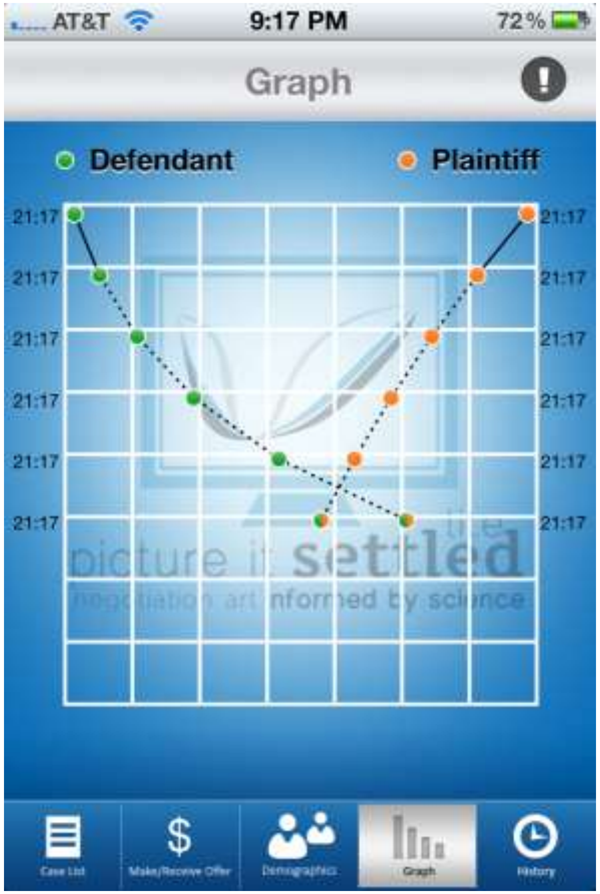
History



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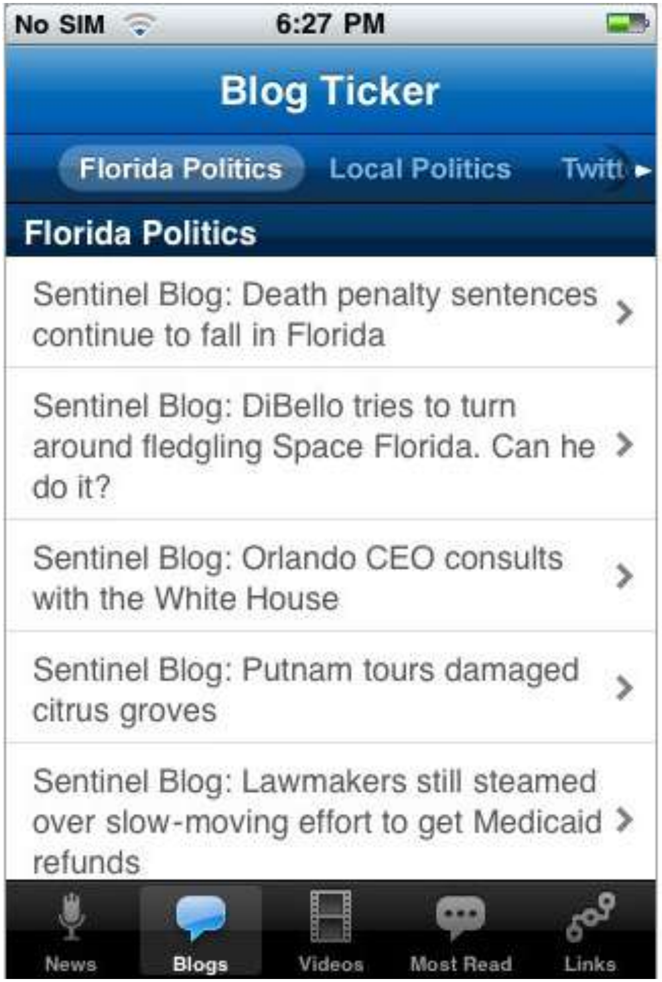
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Florida Politics
Local Politics
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Florida Politics

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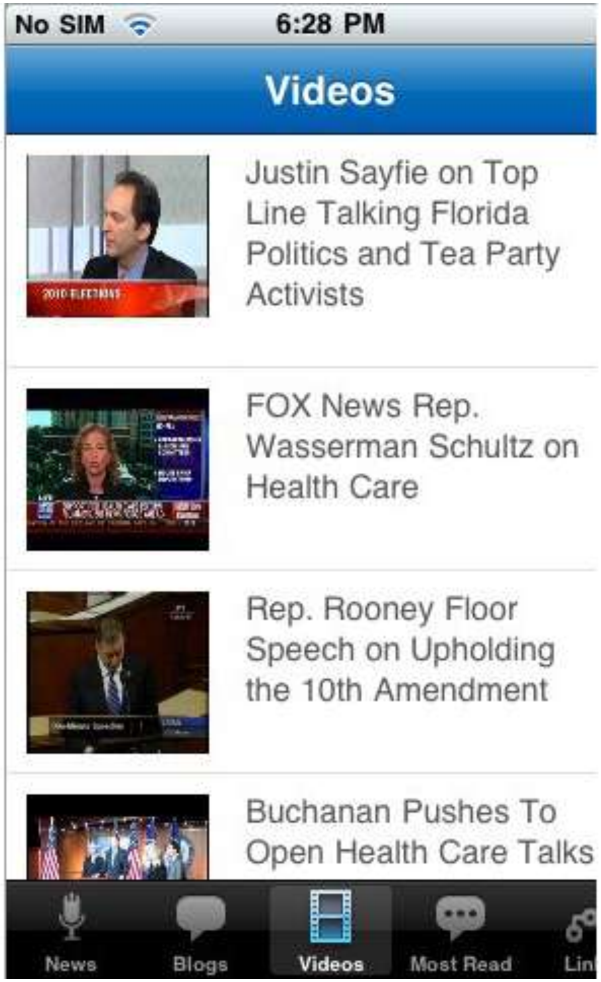
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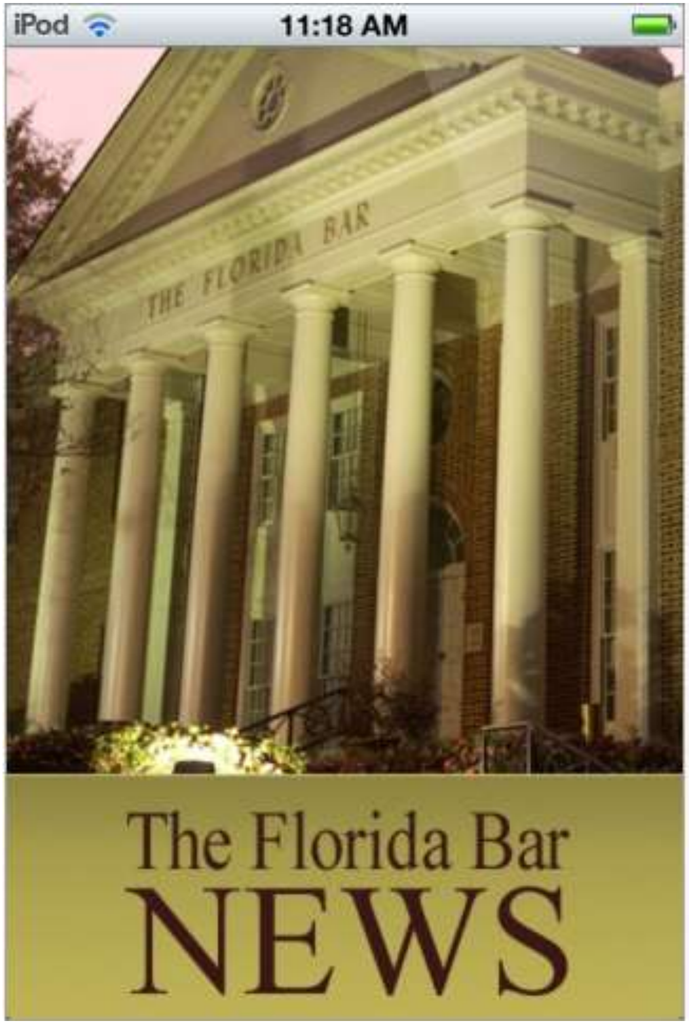
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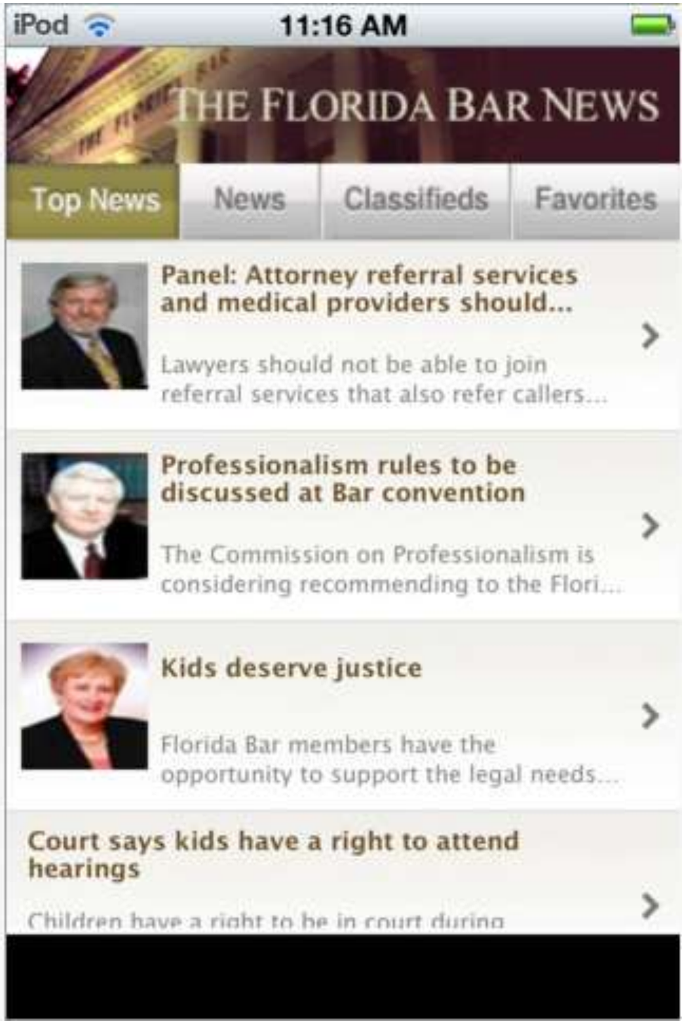
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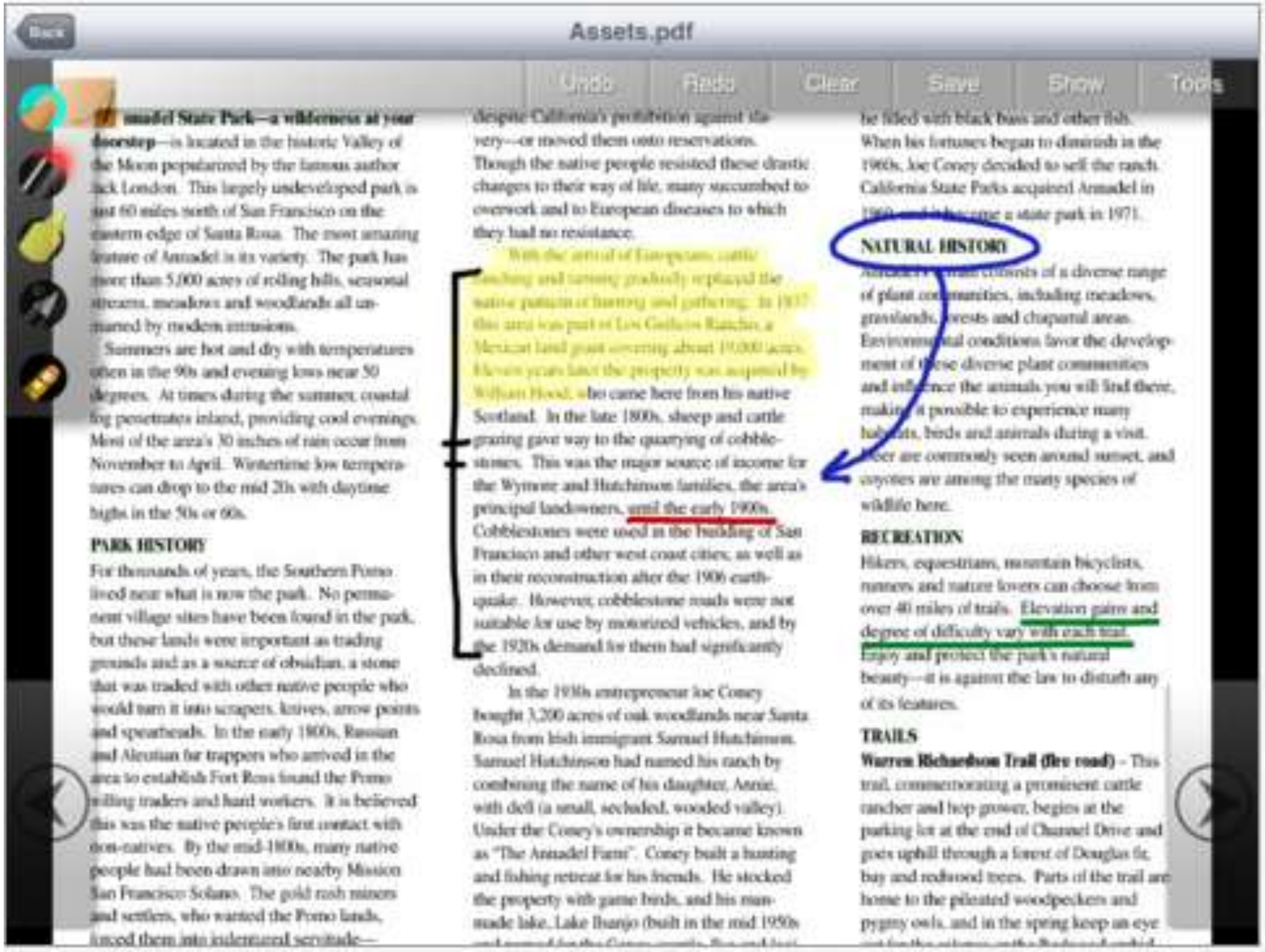
Exhibit A



nnadel State Park—a wilderness at your doorstep—is located in the historic Valley of the Moon popularized by the famous author Jack London. This largely undeveloped park is just 60 miles north of San Francisco on the eastern edge of Santa Rosa. The most amazing feature of Annadel is its variety. The park has more than 5,000 acres of rolling hills, seasonal streams, meadows and woodlands all unmarred by modern intrusions.

Summers are hot and dry with temperatures often in the 90s and evening lows near 50 degrees. At times during the summer, coastal fog penetrates inland, providing cool evenings. Most of the area's 30 inches of rain occur from November to April. Wintertime low temperatures can drop to the mid 20s with daytime highs in the 50s or 60s.

PARK HISTORY

For thousands of years, the Southern Pomo lived near what is now the park. No permanent village sites have been found in the park, but these lands were important as trading grounds and as a source of obsidian, a stone that was traded with other native people who would turn it into scrapers, knives, arrow points and spearheads. In the early 1800s, Russian and Aleutian fur trappers who arrived in the area to establish Fort Ross found the Pomo willing traders and hard workers. It is believed this was the native people's first contact with non-natives. By the mid-1800s, many native people had been drawn into nearby Mission San Francisco Solano. The gold rush miners and settlers, who wanted the Pomo lands, forced them into indentured servitude—despite California's prohibition against slavery—or moved them onto reservations. Though the native people resisted these drastic changes to their way of life, many succumbed to overwork and to European diseases to which they had no resistance.

With the arrival of Europeans cattle ranching and farming gradually replaced the native pattern of hunting and gathering. In 1837 this area was part of Los Guilicos Rancho, a Mexican land grant covering about 19,000 acres. Eleven years later the property was acquired by William Hood, who came here from his native Scotland. In the late 1800s, sheep and cattle grazing gave way to the quarrying of cobblestones. This was the major source of income for the Wymore and Hutchinson families, the area's principal landowners, until the early 1900s. Cobblestones were used in the building of San Francisco and other west coast cities, as well as in their reconstruction after the 1906 earthquake. However, cobblestone roads were not suitable for use by motorized vehicles, and by the 1920s demand for them had significantly declined.

In the 1930s entrepreneur Joe Coney bought 3,200 acres of oak woodlands near Santa Rosa from Irish immigrant Samuel Hutchinson. Samuel Hutchinson had named his ranch by combining the name of his daughter, Annie, with dell (a small, secluded, wooded valley). Under the Coney's ownership it became known as "The Annadel Farm". Coney built a hunting and fishing retreat for his friends. He stocked the property with game birds, and his man-made lake, Lake Ilsanjo (built in the mid 1950s

be filled with black bass and other fish. When his fortunes began to diminish in the 1960s, Joe Coney decided to sell the ranch. California State Parks acquired Annadel in 1969 and it became a state park in 1971.

NATURAL HISTORY

Annadel's [illegible] consists of a diverse range of plant communities, including meadows, grasslands, forests and chaparral areas. Environmental conditions favor the development of these diverse plant communities and influence the animals you will find there, making it possible to experience many habitats, birds and animals during a visit. Deer are commonly seen around sunset, and coyotes are among the many species of wildlife here.

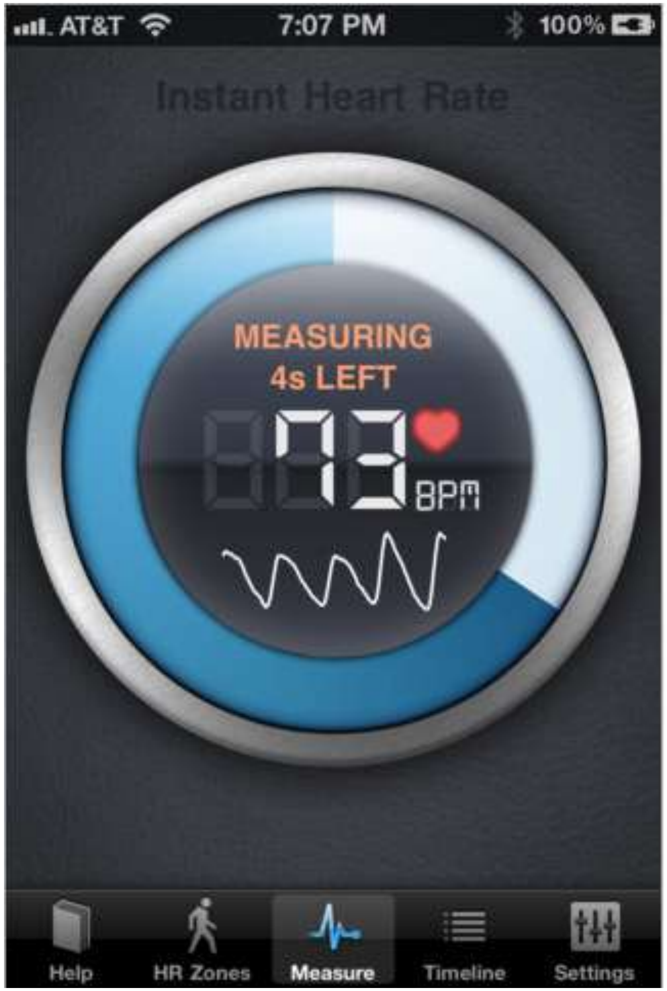
RECREATION

Hikers, equestrians, mountain bicyclists, runners and nature lovers can choose from over 40 miles of trails. Elevation gains and degree of difficulty vary with each trail. Enjoy and protect the park's natural beauty—it is against the law to disturb any of its features.

TRAILS

Warren Richardson Trail (fire road) - This trail, commemorating a prominent cattle rancher and hop grower, begins at the parking lot at the end of Channel Drive and goes uphill through a forest of Douglas fir, bay and redwood trees. Parts of the trail are home to the pileated woodpeckers and pygmy owls, and in the spring keep an eye

Heart Rate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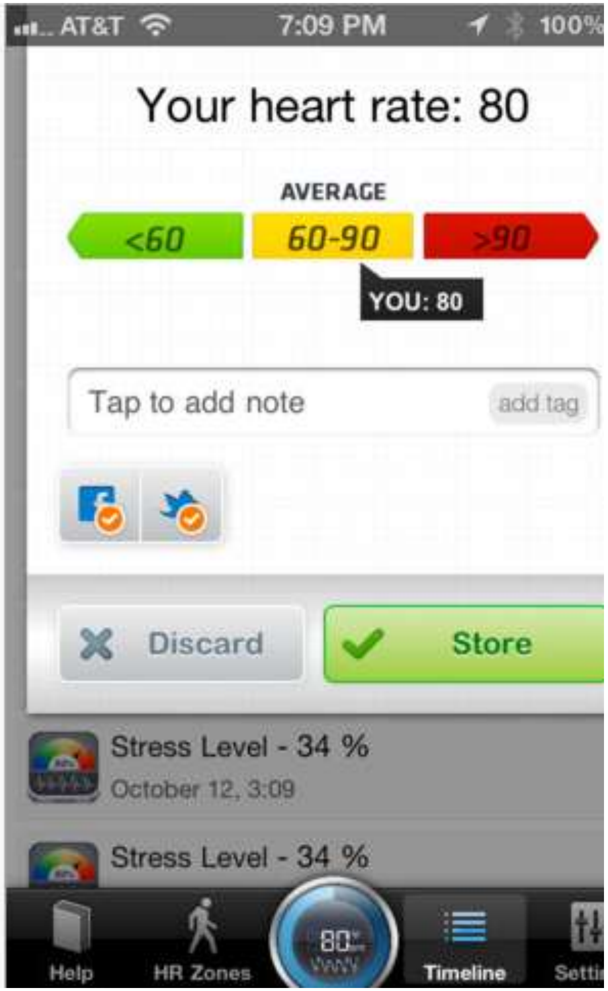

Your heart rate: 80

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Questions & Answers

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ACC Annual Meeting

- Akerman is a proud sponsor of the 2012 ACC Annual Meeting, September 30th through October 3rd, in Orlando
- Sending a contingency of lawyers representing several practice areas, including Corporate, Litigation, Real Estate, and Labor & Employment
- Look for us in the exhibit hall!

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