

The iPhone Contract: What You Should Have Read

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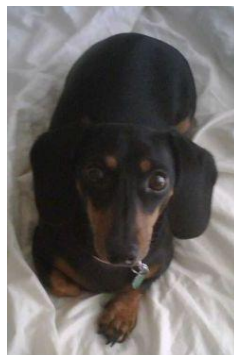


Disclaimer with Cute Animals

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The cute animals just make this slide more bearable.



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Contracts? We don't need no stinkin' contracts!

- When you signed up to be an iPhone developer, you signed two agreements:
 - **iPhone Developer Program License Agreement**
 - **Registered iPhone Developer Agreement**
- You also signed the SDK Agreement, which pretty closely tracks the Developer Program License Agreement.
- The Developer Program License Agreement includes a lot of extra pieces, but the two biggest are Schedule 1 (Free Apps) and Schedule 2 (Paid Apps), which share a lot of language.
- How many of you read them before signing? Do you really know what you got into?

Important Note

- This presentation references files registered_iphone_developer_20081020.pdf and iphone_standard_agreement_20091015.pdf (current to late 2009).
- The Agreements to change and are updated on occasion, so changes may have been made since the version you signed, or if you sign in the future, to the agreement you ultimately sign.
- It also may be hard to get a hold of the pieces of these agreements.
- I've included a lot of quotes from those agreements in *italics*.
- Also, this presentation is text-heavy because it's about contracts. I apologize now for the shortage of pretty pictures, and complete absence of cool product videos.

Wait, are these even valid?

- Lots of talk exists about the validity of ‘click-wrap’ and other such contracts. The courts haven’t consistently held either way.
- These iPhone contracts in particular are certainly valid.
 - You can attempt to negotiate terms with Apple.
 - The contracts aren’t outside the realm of being reasonable.

IT'S DANGEROUS TO GO
ALONE! TAKE THIS.



The follow are the potential
“problem” areas in these
agreements, by topic.

Points that Seem Obvious...

...but still should be mentioned.

- You're only allowed to distribute Apps in the means designated by Apple.
- You're limited to Apple APIs and can only use them as intended.
- You can't create Apps that mess with the App Store, Apple's DRM, device security or OS, etc.
- Distribution on the App store is at Apple's sole discretion, and you have no recourse if they don't sell the App.
- You can write your own EULA, but it has to be consistent with the requirements Apple puts forth.

Confidentiality

aka What, When, and Why You Can and Can't Share Information



Registered iPhone Developer Agreement § 4

- **Confidentiality.** *You agree that any Apple pre-release software (including related documentation and materials) and any information disclosed by Apple to you in connection with Apple Events or Paid Content (defined below) will be considered and referred to as “Apple Confidential Information”.*
- Includes things you develop based on Apple Confidential Information.
- Closely mirrored in **iPhone Developer Program License Agreement § 10.1 and 10.2**

iPhone Developer Program License Agreement

- **2.2 Authorized Test Devices** *As long as an Authorized Test Device contains any pre-release versions of the Apple Software or uses pre-release versions of services, You agree to restrict access to such Authorized Test Device to Your Authorized Developers and to not disclose, show, rent, lease, lend, sell or otherwise transfer such Authorized Test Device to any third party. You further agree to take reasonable precautions to safeguard, and to instruct Your Authorized Developers to safeguard, all Authorized Test Devices from loss or theft. **You acknowledge that by installing any pre-release Apple Software or using any prerelease services on Your Authorized Test Devices, these Devices may be “locked” into testing mode and may not be capable of being restored to their original condition.***
- Since your personal device can be a “test device” this could be a potential stumbling block for even letting a friend use your phone.
- Also important to note that pre-release software may impair your device’s ability to work, so having separate test devices is a good idea.

iPhone Developer Program License Agreement

- **10.3 Information Submitted to Apple Not Deemed Confidential** Apple works with many application and software developers and some of their products may be similar to or compete with Your Applications. Apple may also be developing its own similar or competing applications and products or may decide to do so in the future. To avoid potential misunderstandings, Apple cannot agree, and expressly disclaims, any confidentiality obligations or use restrictions, express or implied, with respect to any information that You may provide in connection with this Agreement or the Program, including information about Your Application, Licensed Application Information and metadata (such disclosures will be referred to as “Licensee Disclosures”). You agree that any such Licensee Disclosures will be **non-confidential**. Apple will be free to use and disclose any Licensee Disclosures on an unrestricted basis without notifying or compensating You. You release Apple from all liability and obligations that may arise from the receipt, review, use, or disclosure of any portion of any Licensee Disclosures. Any physical materials You submit to Apple will become Apple property and Apple will have no obligation to return those materials to You or to certify their destruction.

In summary: what Apple sends you is confidential; what you send Apple is not.



Multi-National Compliance

aka The Hard Part of a Global Launch



iPhone Developer Program License Agreement

- **Regulatory Compliance for Health, Medical and Related Apps:**

3.3.19 You will fulfill any applicable regulatory requirements, including full compliance with all applicable laws, regulations, and policies related to the manufacturing, marketing, sale and distribution of Your Application in the United States, and in particular the requirements of the U.S. Food and Drug Administration ("FDA"), and the laws, regulations and policies of any other applicable regulatory bodies in any countries or territories where You use or make Your Application available. However, You agree that you will not seek any regulatory marketing permissions or make any determinations that may result in any Apple products being deemed regulated or that may impose any obligations or limitations on Apple. By submitting Your Application to Apple for selection for distribution via the App Store, You represent and warrant that You are in full compliance with any applicable laws, regulations, and policies, including but not limited to all FDA laws, regulations and policies, related to the manufacturing, marketing, sale and distribution of Your Application in the United States, as well as in other countries or territories where You plan to make Your Application available via the App Store. You also represent and warrant that You will market Your Application only for its cleared or approved intended use/indication for use, and only in strict compliance with applicable regulatory requirements. You agree to promptly notify Apple in accordance with the procedures set forth in Section 15.6 of any complaints or threats of complaints regarding Your Application in relation to any such regulatory requirements, in which case Apple may remove Your Application from the App Store.

iPhone Developer Program License Agreement

- *3.3.6 Any form of user or device data collection, or image, picture or voice capture or recording performed by the Application (collectively “Recordings”), and any form of user data, content or information processing, maintenance, uploading, syncing, or transmission performed by the Application (collectively “Transmissions”) must comply with all applicable privacy laws and regulations as well as any Apple program requirements related to such aspects, including but not limited to any notice or consent requirements. In particular, a reasonably conspicuous audio, visual or other indicator must be displayed to the user as part of the Application to indicate that a Recording is taking place.*
- **Multi-national privacy is exceedingly complex, and if this is an issue, consult with an attorney.**
- **But if you thought just privacy was hard to deal with, read 3.3.7.**

iPhone Developer Program License Agreement

- *3.3.7 Applications must comply with all applicable criminal, civil and statutory laws and regulations, including those in any jurisdictions in which Your Applications may be offered or made available. In addition, for Applications that use location-based APIs or that collect, transmit, maintain, process, share, disclose or otherwise use a user's personal information or data:*
 - *You and the Application must comply with all applicable privacy and data collection laws and regulations with respect to any collection, transmission, maintenance, processing, use, etc. of the user's location data or personal information by the Application. In addition, the use of any personal information should be limited solely as necessary to provide services or functionality for Your Application (e.g., the use of collected personal information for tele-marketing purposes is prohibited (unless expressly consented to by the user)). You and the Application must also take appropriate steps to protect any such location data or personal information from unauthorized disclosure or access.*
 - *Applications may not be designed or marketed for the purpose of harassing, abusing, stalking, threatening or otherwise violating the legal rights (such as the rights of privacy and publicity) of others.*
 - *Applications may not perform any functions or link to any content or use any robot, spider, site search or other retrieval application or device to scrape, retrieve or index services provided by Apple or its licensors, or to collect, disseminate or use information about users for any unauthorized purpose.*

There's *MORE*?

- Generally, you're also responsible for whether or not your content is allowed in the countries you sell in per §5.1, and for your rating per §5.2 of Schedules 1 & 2. Oh, and §5.3 says that they can elect not to distribute your app if a government or other rating may be required in that country.
- For paid Apps, Schedule 2 also puts a lot of tax burdens on you (per §3.2 and Exhibit B), not to mention specific provisions for specific countries (Exhibit D).
 - To the extent Apple is taking taxes out of your revenues, it all comes from your cut, not Apple's.
 - Apple also gets to determine the exchange rate, which will likely be in their favor. (Exhibit C)

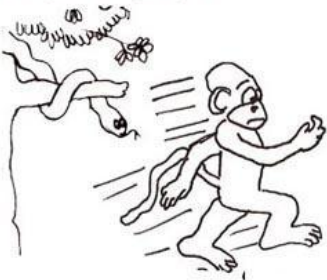
Can I Avoid This Mess?

Run Away

run away _____

run away _____

A monkey
running away
from a snake



A monkey
running away
from a tiger



Have you ever run away from somebody?

Have you ever run away from a dog?

Have you ever run away from a tiger?

Have you ever run away from a bear?

The agreements allows you to
designate what countries are
eligible to receive distribution
(i.e. Dev. Program License
Agreement, Schedule 1, § 2.1
(ii))

**If all else fails, only
designate the US.**

Conveniently, this is also a
solution to the next issue...

Export Controls

aka The Government Thinks Your App Goes Boom in the Night



Registered iPhone Developer Agreement § 14

- **Export Control.** *You may not use or otherwise export or re-export any Apple Confidential Information received from Apple except as authorized by United States law and the laws of the jurisdiction in which the Apple Confidential Information was obtained. In particular, but without limitation, the Apple Confidential Information may not be exported or re-exported (a) into any U.S. embargoed countries or (b) to anyone on the U.S. Treasury Department's list of Specially Designated Nationals or the U.S. Department of Commerce Denied Person's List or Entity List. By becoming a Registered iPhone Developer or using any Apple Confidential Information, you represent and warrant that you are not located in any such country or on any such list. You also agree that you will not use any Apple Confidential Information for any purposes prohibited by United States law, including, without limitation, the development, design, manufacture or production of nuclear, chemical or biological weapons.*
- Mirrored in **iPhone Developer Program License Agreement § 15.9**
- **Embargoed Countries:**
 - Cuba
 - Iran
 - Myanmar (Burma)
 - North Korea (Democratic People's Republic of Korea)
 - Sudan
 - Syria
 - Libya and Iraq aren't embargoed anymore but have special sanctions

Registered iPhone Developer Agreement § 14

- Where are the lists?
 - Denied Parties List:
 - <http://www.bis.doc.gov/dpl/default.shtm>
 - Entity List:
 - <http://www.bis.doc.gov/entities/default.htm>
 - Unverified End-users List:
 - http://www.bis.doc.gov/enforcement/unverifiedlist/unverified_parties.html
 - Specially Designated Nationals and Other Blocked Entities (includes terrorists) List:
 - <http://www.treas.gov/offices/enforcement/ofac/sdn/>
 - Debarred List:
 - <http://www.pmddtc.state.gov/compliance/debar.html>
 - Nonproliferation Sanctions List:
 - <http://www.state.gov/t/isn/c15231.htm>
- What exactly constitutes an export?
 - Physical Shipment of Storage Media
 - Hand Delivery
 - Electronic Delivery in All Forms – E-mails, Downloads, etc.
 - To anyone in another country or to anyone who is not a US Citizen or Green Card Holder, *including any employees you may have!*
- What's controlled?
 - Among other things, software that includes encryption technology

This is also important because of...

iPhone Developer Program License Agreement

- **Schedule 1 & 2, §2.3** *You hereby certify that all of the Licensed Applications You deliver to Apple under this Schedule 1 are authorized for export from the United States to each of the countries designated by You under Section 2.1 hereof, in accordance with the requirements of the United States Export Administration Regulations, 15 C.F.R. Parts 730-774. Without limiting the generality of this Section 2.3, You certify that (i) none of the Licensed Applications contains, uses or supports any data encryption or cryptographic functions; or (ii) in the event that any Licensed Application contains, uses or supports any such data encryption or cryptographic functionality, You have qualified that Licensed Application for export as a “mass market encryption item” in accordance with section 742.15(b)(2) of the Export Administration Regulations, and You will provide Apple with a PDF copy of the mass market export classification ruling (CCATS) issued by the United States Commerce Department, Bureau of Industry and Security for that Licensed Application. For purposes of determining the proper export classification and export control status of each Licensed Application, You should consult the export compliance decision tree in the iTunes Connect tool. You acknowledge that Apple is relying upon Your certification in this Section 2.3 in allowing end-users to access and download the Licensed Applications under this Schedule 1. Except as provided in this Section 2.3, Apple will be responsible for compliance with the requirements of the Export Administration Regulations in allowing end-users to access and download the Licensed Applications under this Schedule 1.*

Summary?

- Don't export anything Apple gives you.
- If your software contains any encryption elements of any sort, you need approval from the US government for export.
- The approval process and determining actual requirements can be exceedingly complex because there are a lot of variables.
- If this is an issue for your product, find an attorney who understands and has experience in export controls for encryption ASAP as the process is not always quick.
- **More than anything else in this presentation, COMPLY WITH THESE RULES. Failure to do so can result in you being fined and/or sent to jail.**



Changes, Revisions, & Amendments

aka Things That Happen Right Under Your Nose



Registered iPhone Developer Agreement § 7

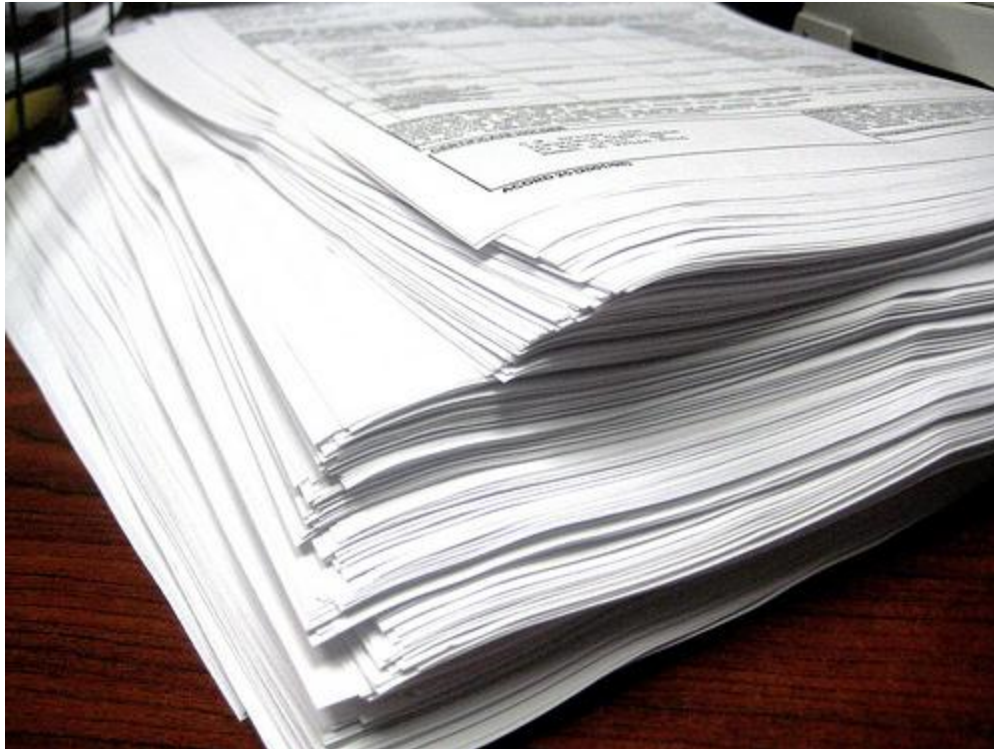
- ***Amendment; Communication.*** Apple reserves the right, at its discretion, to modify this Agreement, including any rules and policies at any time. You will be responsible for reviewing and becoming familiar with any such modifications (including new terms, updates, revisions, supplements, modifications, and additional rules, policies, terms and conditions)(“Additional Terms”) communicated to you by Apple. All Additional Terms are hereby incorporated into this Agreement by this reference and your continued use of the Site will indicate your acceptance of any Additional Terms.
- Approximately the same applies to both Agreements.

iPhone Developer Program License Agreement § 4

- **4. Changes to Program Requirements or Terms** Apple may change the Program Requirements or the terms of this Agreement at any time. New or modified Program Requirements will not retroactively apply to Applications already in distribution. In order to continue using the Apple Software or any services, You must accept and agree to the new Program Requirements and/or new terms of this Agreement. If You do not agree to new Program Requirements or new terms, Your use of the Apple Software and any services will be suspended or terminated by Apple. You agree that Your acceptance of such new Agreement terms or Program Requirements may be signified electronically, including without limitation, by Your checking a box or clicking on an “agree” or similar button. Nothing in this Section shall affect Apple's rights under Section 8 below.

Other Agreements by Reference

aka Keep Reading



Registered iPhone Developer Agreement § 10

- ***Use Of Apple Trademarks, Logos, etc.*** You agree to follow Apple's Guidelines For Using Apple Trademarks and Copyrights as published on Apple's website at www.apple.com/legal/guidelinesfor3rdparties.html and as may be modified from time to time.

iPhone Developer Program License Agreement

- *3.3.11 If Your Application accesses the Google Mobile Maps (GMM) service through the Maps API, use of the GMM Service is subject to Google's Terms of Service which will be set forth at: <http://code.google.com/apis/maps/terms/iPhone.html>. If You do not accept such Google Terms of Service, including, but not limited to all limitations and restrictions therein, You may not use the GMM service in Your Application. You acknowledge and agree that use of the GMM Service in Your Application will constitute Your acceptance of such Terms of Service.*

Quick Hits: Minor Clauses Worth Noting

aka A Bunch of Random Other Potential Problems



Registered iPhone Developer Agreement § 8-10

- ***Term and Termination.*** Apple may terminate or suspend you as a Registered iPhone Developer at any time in Apple's sole discretion.
- ***Apple Independent Development.*** Nothing in this Agreement will impair Apple's right to develop, acquire, license, market, promote or distribute products, software or technologies that perform the same or similar functions as, or otherwise compete with, any other products, software or technologies that you may develop, produce, market, or distribute. In the absence of a separate written agreement to the contrary, Apple will be free to use any information, suggestions or recommendations you provide to Apple pursuant to this Agreement for any purpose, subject to any applicable patents or copyrights.

iPhone Developer Program License Agreement

- Attachment 1 (Push Notifications)
 - *2.3 You may not excessively use the overall network capacity or bandwidth of the APN, or unduly burden an iPhone or iPod touch device with excessive Push Notifications, as may be determined by Apple in its reasonable discretion. In addition, You agree not to harm or interfere with Apple's networks or servers, or any third party servers or networks connected to the APN, or otherwise disrupt other developers' use of the APN.*

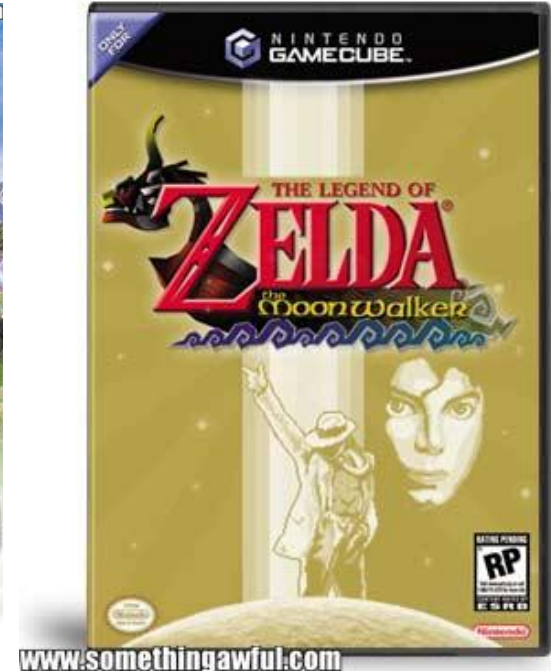
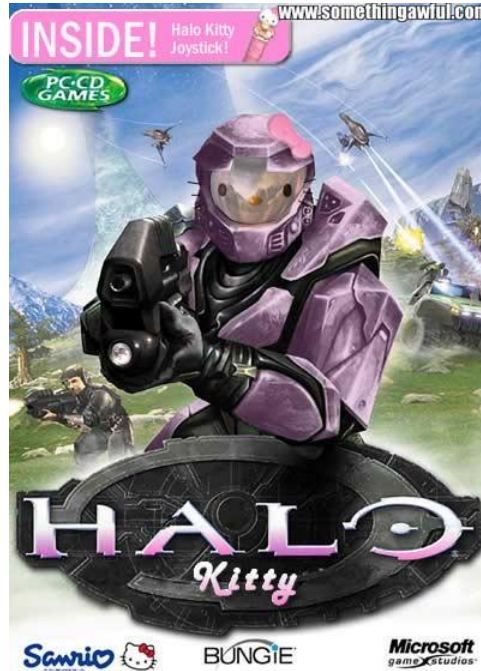
iPhone Developer Program License Agreement

- **Attachment 2: Additional Terms for Use of the In App Purchase API**
- **2.1 No Points Purchases.** (i.e. Can't buy Microsoft Points or Wii Shop Points)
- **2.2 No currency purchases (real or virtual)** *"including but not limited to any Currency for exchange, gifting, redemption, transfer, trading or use in purchasing or obtaining anything within or outside of Your Application. "Currency" means any form of currency, points, credits, resources, content or other items or units recognized by a group of individuals or entities as representing a particular value and that can be transferred or circulated as a medium of exchange."*
- **2.3 Subscriptions are fine, rentals are not.** *"(e.g., use of a particular game item or digital book for a predetermined, limited period of time)."*
- **2.4 No sending additional code (all In App Purchases must be unlocked content)**
- **2.5 No objectionable content.**
- **2.6** *With the exception of items of content that an end user consumes or uses up within Your Application (e.g. poker chips or virtual supplies such as construction materials) (a "Consumable"), any other content, functionality, services or subscriptions purchased through the use of the In App Purchase API must be made available to end users in accordance with the same usage rules as Licensed Applications (e.g. any such content, services or functionality must be available to all of the devices associated with an end user's account). You will be responsible for identifying Consumable items to Apple and for disclosing to end users that Consumables will not be available for use on other devices.*

iPhone Developer Program License Agreement

- Indemnification is pretty standard, but given Apple's size compared to yours, it's in your best interest to avoid claims you'll have to indemnify apple for at all costs.
- **11. Indemnification** *To the extent permitted by law, You agree to indemnify and hold harmless, and upon Apple's request, defend, Apple, its directors, officers, employees, independent contractors and agents (each an "Apple Indemnified Party") from any and all claims, losses, liabilities, damages, taxes, expenses and costs, including without limitation, attorneys fees and court costs (collectively, "Losses"), incurred by an Apple Indemnified Party and arising from or related to any of the following: (i) **Your breach of any certification, covenant, obligation, representation or warranty in this Agreement, including Schedule 2 (if applicable); (ii) any claims that Your Application or the distribution, sale, offer for sale, use or importation of Your Application (whether alone or as an essential part of a combination), Licensed Application Information or metadata, violate or infringe any third party intellectual property or proprietary rights; (iii) Your breach of any of Your obligations under the EULA (as defined in Schedule 1 or Schedule 2 (if applicable)) for Your Licensed Application; (iv) Apple's permitted use, promotion or delivery of Your Licensed Application, Licensed Application Information, metadata, related trademarks and logos, or images and other materials that You provide to Apple under this Agreement, including Schedule 2 (if applicable); or (v) Your use of the Apple Software or services, Your Application, Licensed Application Information, metadata, Registered Devices, or Your development and distribution of any Application.***

I know that was a lot, and some of it may be daunting. Just remember, it could always be worse...



Questions?

Mark Methenitis is an attorney with The Vernon Law Group, PLLC, in Dallas, TX, as well as a columnist for Joystiq. He is the author of the Law of the Game (<http://www.lawofthegame.com>) blog, which was honored as one of the American Bar Association Journal's Top 100 Legal Blawgs in 2007. His 2005 paper on MMORPG gambling was one of the first on the topic and has been widely cited, and his 2007 update to that paper was published in the Gaming Law Review in August 2007. Mark is also on the board of the Dallas chapter of the IGDA. Mark practices primarily in the area of international transactional and compliance law. To assist electronic entertainment clients, both gambling and video gaming, Mark focuses on emerging and continuing legal issues created in the electronic gaming world. He has handled many complex transactional and structuring issues, but also has found solutions to very complex compliance problems, especially related to regulations in the international trade, gambling, and FTC arenas. Mark is a member of the Texas Bar. He earned his BA from the University of Texas, and his JD and MBA from Texas Tech University.