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REPRESENTING ELON MUSK

Joan MacLeod Heminway*

“Elon Musk is often described as a visionary, leading Tesla in its disruption of the car industry to become the world’s most valuable car manufacturer. He has also repeatedly pushed the boundaries of corporate law.”¹

As a business law professor, I have found it hard to ignore billionaire innovator and corporate executive Elon Musk over the past few years. Others in the law professoriate also are riveted to his business escapades. His entrepreneurial and personal activities routinely engage—and challenge—legal doctrine, especially business law. These activities receive significant media attention. As a result, Elon Musk has made his way into my classroom teaching many times in recent semesters.

Truly, the legal troubles of Elon Musk and his businesses have become almost legendary. In response to the prompt: “Tell me about legal issues Elon Musk has faced since 2020,” Google Bard (now rebranded as Gemini) provided the response set forth below, quoted in relevant part.²

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1. Assaf Hamdani & Kobi Kastiel, *Superstar CEOs and Corporate Law*, 100 WASH. U. L. REV. 1353, 1354 (2023).

2. See Landing Page, GOOGLE BARD, <https://bard.google.com> (last visited Dec. 29, 2023). The following bullet point was removed from the summary because it plainly was outside the date parameter specified in the prompt:

- Defamation lawsuit: In 2018, Musk called British cave diver Vernon Unsworth a “pedo guy” on Twitter after Unsworth criticized Musk’s plan to rescue a group of Thai boys trapped in a cave. Unsworth sued Musk for defamation, and a jury found Musk not liable in 2019.

Id. In addition, a reference in the second bullet point to the DFEH lawsuit being brought in 2000 was removed, since publicly available information about the lawsuit indicate it was filed in February 2022. *Id.*; see Civil Rights Complaint for Injunctive and Monetary Relief

Elon Musk has faced a number of legal issues since 2020, including:

- Securities fraud allegations: In 2018, Musk tweeted that he had “funding secured” to take Tesla private, but he later admitted that this was not the case. The Securities and Exchange Commission (SEC) sued Musk for securities fraud, and he settled the case by agreeing to pay a \$20 million fine and step down as chairman of Tesla’s board of directors. . . .
- Tesla racial discrimination allegations: . . . [T]he California Department of Fair Employment and Housing (DFEH) filed a lawsuit against Tesla, alleging that the company had engaged in racial discrimination at its Fremont, California factory. The lawsuit is ongoing.
- Tesla Autopilot investigations: The National Highway Traffic Safety Administration (NHTSA) is investigating a number of crashes involving Tesla vehicles equipped with Autopilot, the company’s driver-assistance system. The NHTSA is also investigating Tesla’s claims about the capabilities of Autopilot.
- Twitter acquisition saga: In 2022, Musk agreed to buy Twitter for \$44 billion, but he later tried to back out of the deal. Twitter sued Musk to force him to go through with the acquisition. . . .³

Of course, this summary is underinclusive,⁴ may be overinclusive (in that some of the described legal actions may not include Musk as an individual defendant), and is likely to be rendered inaccurate

and Damages, Dep’t of Fair Emp. & Hous. v. Tesla, Inc., No. 22CV006830, 2022 WL 421270 (Cal. Super. Ct. Feb. 9, 2022). Also, a reference in the last bullet point to the Twitter litigation being “ongoing” was removed. The case was dismissed in November 2022. See, e.g., Jef Feeley, *Twitter-Musk Legal Fight Officially Ends as Judge Dismisses Suit*, BLOOMBERG LAW (Nov. 15, 2022, 11:48 AM), <https://news.bloomberglaw.com/litigation/twitter-musk-legal-fight-officially-ends-as-judge-dismisses-suit>. Gratuitous additional information added to the end of the response also are omitted here.

3. *Id.*

4. For example, the summary leaves out the unsuccessful private civil legal action brought against Musk in connection with the securities fraud claim referenced in the first bullet point above. See Michael Liedtke & The Associated Press, *Elon Musk is Cleared of Wrongdoing for Tweeting He Had ‘Funding Secured’ to Take Tesla Private, Avoiding Billions in Potential Damages*, FORTUNE (Feb. 3, 2023, 6:19 PM), <https://fortune.com/2023/02/03/elon-musk-tesla-funding-secured-tweet-trial-jury-verdict/>.

by the time this Article is published. The exercise merely is designed to illustrate the number, breadth, and highly public nature of legal issues Elon Musk has faced in the three years preceding the publication of this Article (many undoubtedly addressed in other works published together with this Article). The substance of Elon Musk's corporate governance and corporate finance (including M&A) legal tangles is particularly engaging for me because I teach the law of business governance and finance and am, by practice background, a corporate finance lawyer.

Yet, as I have proceeded to identify, consider, analyze, teach, and write about relevant substantive legal questions involved in Elon Musk's business exploits, Elon Musk's personality and unconventional behaviors also have captivated me. The combination of his business dealings and his unorthodox communications and conduct in and in connection with those dealings has fostered curiosity in me. I cannot help wondering what it would be like to represent Elon Musk or take direction from him and advise him as an officer or other authorized representative of one of his businesses. More specifically, I have become interested in how a business lawyer's professional obligations may be implicated and tested in some of the legal situations in which Elon Musk has found himself. How does a competent, compassionate business lawyer contemplate, prepare for, and engage in representing Elon Musk or a client like him?

That is the subject of this Article. It proceeds in two principal parts. The Article first provides a description of Elon Musk based on publicly available information and commentary. Then, this amalgamated depiction of Elon Musk is considered through a professional conduct lens, offering observations on the challenges of representing or working with someone with characteristics and behaviors substantially like those attributed to Elon Musk. A brief conclusion follows.

I. WHO IS ELON MUSK AND HOW DOES HE CONDUCT HIMSELF IN HIS AFFAIRS?

Descriptions of Elon Musk are ubiquitous in the news and social media. Comments about his business genius are matched—and sometimes overshadowed—by musings about his mental state. For example, after the now infamous “going private” tweet in 2018, described in the Google Bard summary above, that led to both

public civil enforcement (by the U.S. Securities and Exchange Commission) and a private class action against Elon Musk, one national news reporter wrote:

There's no question that Elon Musk is one of the great entrepreneurs of this era. He may even be in "a class of one," as he recently described Tesla, the revolutionary electric car company he founded.

But Mr. Musk's tweet last week — expressing his intent to take Tesla private and declaring that he had "funding secured" for the multibillion-dollar transaction — was so impulsive, potentially inaccurate, poorly worded and thought out, and with such potentially dire consequences for himself, Tesla and its shareholders, that the board now must ask a sensitive but vital question: What was Mr. Musk's state of mind when he wrote it?⁵

The reporter proceeds to raise questions about Elon Musk's psychological and behavioral wellbeing and stability as they may relate to specific individual or institutional decision-making.⁶ Other articles in the popular press document his short fuse when it comes to anger management, as well as impulsive and unpredictable behaviors (including cavalier mass firings of employees at Twitter and insensitivity to matters of gender and racial identity in the workplace).⁷

Psychologists have offered similar nuanced reflections on Elon Musk's business acumen and psychological stability in professional publications and news media. For example, after taking caveats for the inability to diagnose psychological health

5. James B. Stewart, *A Question for Tesla's Board: What Was Elon Musk's Mental State?*, N.Y. TIMES (Aug. 15, 2018), <https://www.nytimes.com/2018/08/15/business/elon-musk-tesla-board.html>.

6. *Id.* ("The explanation for the tweet may be more psychological than strategic. In a Twitter exchange from last summer, Mr. Musk said he experienced 'great highs, terrible lows and unrelenting stress.'").

7. See, e.g., Bess Levin, *A Reminder of Just Some of the Terrible Things Elon Musk Has Said and Done*, VANITY FAIR (Apr. 26, 2022), <https://www.vanityfair.com/news/2022/04/elon-musk-twitter-terrible-things-hes-said-and-done>; Russ Mitchell, *Is the World's Richest Person the World's Worst Boss? What It's Like Working for Elon Musk*, L.A. TIMES (Nov. 14, 2022, 5:00 AM), <https://www.latimes.com/business/story/2022-11-14/elon-musk-toxic-boss-timeline>; Bryan Robinson, *Elon Musk's Leadership Style Bad for Business And Mental Health, Experts Warn*, FORBES (Nov. 21, 2022, 6:44 AM), <https://www.forbes.com/sites/bryanrobinson/2022/11/21/elon-musks-leadership-style-bad-for-business-and-mental-health-experts-warn/?sh=21ae4b3457f2>.

based on an individualized assessment, a psychologist offers the following general observation:

Elon Musk is a highly successful entrepreneur and CEO of several companies, including SpaceX and Tesla. He is known for his ambitious vision and innovative approach to problem-solving, and has been described as a “risk taker” and a “disruptor.” However, his public persona and behavior have also attracted significant attention and sparked debate, with some people questioning his mental stability and leadership style.⁸

Another psychologist offered a consistent conclusion in the popular press, observing that “Musk’s optimism, passion for innovation, and audacious risk-taking have fueled his unprecedented success. But the same qualities that made him who he is could very well lead to his undoing if he lets ego, tone-deafness, and narcissism steer his decision-making.”⁹

The composite representation of Elon Musk from these and other public accounts is that he is creative, determined, and idealistic; he may act in a manner that is unpredictable, impulsive (perhaps even erratic), risk-preferring (or risk ignoring or even careless), quick to anger, or perceived to be mentally imbalanced. Identifying these and other attributes of Elon Musk may reveal whether he is merely a challenging client or, instead, a truly difficult one.

When presented with this question, you may think “what’s the difference?” While indeed, both types of clients are high-needs and demanding, the difference between the two is that while challenging clients have high standards and can require a lot of work and time, they can typically be satisfied once their expectations are met.

Unearthing those expectations, the motivations behind them and the best method of delivery can be frustrating for the lawyer—but those things do not necessarily make the client a “bad” client, nor are they reason enough to cut ties.¹⁰

8. Martina Paglia, *Why Elon Musk Is So Successful According to Psychology*, INT’L PSYCH. (Dec. 20, 2022), <https://theinternationalpsychologyclinic.com>.

9. Mark Travers, *How Psychological Research Can Help Explain Elon Musk’s Leadership Style*, FORBES (Nov. 23, 2022, 11:54 AM), <https://www.forbes.com/sites/traversmark/2022/11/23/can-psychological-research-help-us-understand-elon-musk-polarizing-brand-of-leadership/?sh=5ceb08901076>.

10. *One Tough Customer: Discerning Between Challenging and Difficult Clients*, LEXISNEXIS (Oct. 21, 2019), <https://www.lexisnexis.com/community/insights/legal/b/>

Leading with empathy or compassion can go a long way toward gauging a client's expectations and places the emphasis on the client's circumstances, not those of the lawyer.¹¹ If Elon Musk is a difficult client, he may not respond to a lawyer's attempts to engage (and eventually may work himself out of being a client). But by initially taking a high road and focusing on his objectives and endeavoring to manage his perceived risks, the lawyer will have learned what they can about who he is and how he comports himself.

Complicating this emerging—and somewhat dichotomous—public media picture of Elon Musk are two public acknowledgements relating to his health. Specifically, he has indicated that he battles with bipolar depression, for which he reportedly takes ketamine,¹² although no formal medical diagnosis has been publicly reported.¹³ He also has openly stated, however, that as a child, he was diagnosed with Asperger Syndrome, a condition now recognized as a form of autism spectrum disorder (“ASD”).¹⁴

This Article assumes that Elon Musk's public statements about his bipolar and ASD diagnoses are accurate. The conditions are discrete, although their manifestations may overlap. Moreover, researchers note that diagnosed depression—including bipolar disorder—may coexist with or stem from Asperger Syndrome.¹⁵

thought-leadership/posts/one-tough-customer-discerning-between-challenging-and-difficult-clients.

11. *Id.*

12. See, e.g., Stewart, *supra* note 5; Kirsten Grind & Katherine Bindley, *Magic Mushrooms. LSD. Ketamine. The Drugs That Power Silicon Valley.*, WALL ST. J. (June 27, 2023, 11:46 AM), https://www.wsj.com/articles/silicon-valley-microdosing-ketamine-lsd-magic-mushrooms-d381e214?mod=hp_lead_pos7; Abigail Miller, *Elon Musk Reveals He Is Bipolar in Candid Tweets About 'Terrible Lows and Unrelenting Stress' from Depression*, DAILY MAIL (July 31, 2017, 15:36), <https://www.dailymail.co.uk/health/article-4746914/Elon-Musk-tweets-depression-bipolar-disorder.html>.

13. Although there have been no public reports of a bipolar disorder medical diagnosis, this Article assumes the truth of Elon Musk's self-diagnosis.

14. This revelation was made on NBC's *Saturday Night Live* in May 2021. See, e.g., Dave Itzkoff, *Elon Musk Hosts a Mother's Day Episode of 'Saturday Night Live'*, N.Y. TIMES (May 18, 2021), <https://www.nytimes.com/2021/05/09/arts/television/elon-musk-snl.html>; Joe Walsh, *Elon Musk Reveals He Has Asperger's on 'Saturday Night Live'*, FORBES (May 9, 2021, 9:14 AM), <https://www.forbes.com/sites/joewalsh/2021/05/09/elon-musk-reveals-he-has-aspergers-on-saturday-night-live/?sh=cffaa7af640b>.

15. See Farnaz Faridi & Reza Khosrowabadi, *Behavioral, Cognitive and Neural Markers of Asperger Syndrome*, 8 BASIC & CLINICAL NEUROSCIENCE 349, 354–55 (2017). Specifically: Many AS individuals develop secondary psychiatric disorders in adolescence and adulthood. This could be because of genetic, psychiatric family history, and neurological diseases in autistic spectrum disorders. The most common comorbidity

Bipolar disorder and ASD are distinct diagnoses. However, there are some ways in which the two conditions can look similar, and it is perfectly possible to be diagnosed as autistic and with bipolar disorder. According to one study, about 7% of autistic people also have a bipolar diagnosis, nearly three times the percentage of people in the general population. Another study found about 40% of people diagnosed with bipolar disorder also exhibit traits of autism spectrum disorder.¹⁶

It may be hard to attribute an individual's affects or behavior specifically to either bipolar disorder or ASD. Yet, it is useful to understand the attributes of each as they may impact Elon Musk (and an attorney-client relationship with Elon Musk).

According to the National Institute of Mental Health, “[b]ipolar disorder (formerly called manic-depressive illness or manic depression) is a mental illness that causes unusual shifts in a person’s mood, energy, activity levels, and concentration.”¹⁷ The changes in mood, energy, and activity levels may range across positive/high energy, neutral, and negative/low energy episodes.¹⁸ Elon Musk has described his experience as “great highs, terrible lows and unrelenting stress.”¹⁹

As earlier noted, Asperger Syndrome is a former diagnostic label now medically recognized and categorized as an ASD.²⁰ An ASD diagnosis comes with a list of attributes unique to the individual that, as with many medical diagnoses, may impact workplace performance and personal conduct in a variety of

include Attention Deficit and Hyperactivity Disorder (ADHD), depression, or both. They more likely to have relatives with depression, schizophrenia, and broader autistic phenotype. Moreover, AS seems to be more prevalent in adults with ADHD. Along with above mentioned disease, bipolar disorder in AS is frequently observed. *Id.* (citations omitted).

16. Lisa Jo Rudy, *The Connection Between Bipolar Disorder and Autism: What to Know*, VERYWELL HEALTH (Nov. 26, 2023), <https://www.verywellhealth.com/bipolar-disorder-and-autism-5204652> (footnotes omitted).

17. *Bipolar Disorder*, NAT'L INST. OF MENTAL HEALTH, <https://www.nimh.nih.gov/health/topics/bipolar-disorder> (last visited Oct. 2, 2023). “These shifts can make it difficult to carry out day-to-day tasks.” *Id.*

18. *Id.*

19. Elon Musk (@elonmusk), X (July 30, 2017, 1:23 PM), <https://twitter.com/elonmusk/status/891710778205626368>.

20. See Devon Price, *A Concern About “Asperger’s” Terminology*, PSYCH. TODAY (June 28, 2021), <https://www.psychologytoday.com/nz/blog/shrugging-should/202106/concern-about-aspergers-terminology>; Alexandra Benisek, *What Is Autism?*, WEBMD, <https://www.webmd.com/brain/autism/understanding-autism-basics> (last visited Dec. 29 2023).

ways.²¹ As a result, ASD may manifest differently in different people.²² In explaining his life with Asperger Syndrome as a child, Elon Musk offered:

I guess for me, social cues were not intuitive. . . . [O]thers could intuitively understand . . . what was meant by something. I would just tend to take things very literally. . . . But then that . . . turned out to be wrong. . . . They are not simply saying exactly what they mean. There's all sorts of other things that are meant. It took me a while to figure that out.²³

General characteristics of individuals diagnosed with Asperger Syndrome may include: difficulty in interacting socially, interest in a narrow set of things, trouble following the flow of a conversation, highly focused interest in certain things, attentiveness to detail, persistence, a preference and wish for consistency or sameness or homogeneity, challenges with nonverbal skills, heightened sensory sensitivities, a talent for pattern recognition, and unique personal gifts or strengths.²⁴

21. See Barbara Bissonnette, *The Employer's Guide to Asperger's Syndrome*, FORWARD MOTION COACHING, at 5, <https://www.antioch.edu/wp-content/uploads/2017/01/ASDEmpGuide.pdf> (last visited March 20, 2023) ("People with Asperger's Syndrome are represented in all kinds of professions. . . . Like any other human being, each possesses a unique combination of talents, abilities, strengths and weaknesses.").

22. See Carolyn Gammicchia & Catriona Johnson, *Autism Information for Advocates, Attorneys, and Judges*, AUTISM SOC'Y, <https://ocfcpacourts.us/wp-content/uploads/2021/09/3.-Autism-Information-for-Advocates-Attorneys-and-Judges.-new.pdf> (last visited Feb. 5, 2024) ("Autism is a complex developmental disability. It is a neurological condition with a variety of symptoms that affect individuals in different ways."); see also Walsh, *supra* note 14 ("Asperger's syndrome is an autism spectrum disorder usually linked to social difficulties but fairly strong verbal and cognitive skills. Some observers and hiring managers have suggested people with Asperger's can perform well in tech, entrepreneurship, and other fields that require strong analytical skills.").

23. TED, *Elon Musk Talks Twitter, Tesla and How His Brain Works — Live at TED2022*, YOUTUBE (Apr. 14, 2022), <https://www.youtube.com/watch?v=cdZZpaB2kDM&t=5s>. In researching and presenting this Article to academic and practice audiences over a period of months, I had occasion to communicate with several people about the wide range of abilities and disabilities of children and adults on the autism spectrum. For some, the diagnosis is associated with debilitating symptoms and cost-prohibitive insurance premiums, assuming appropriate insurance is available. Some children may have trouble dressing themselves, for example, and setting up an educational plan through the public schools can be frustrating (to say the least). In adults, sensory hypersensitivities and communication barriers can present special difficulties in getting through the day productively and happily. I appreciate the educational process that writing this Article offered me in this regard and am grateful to those who shared their stories with me. I have come to realize that more public education on legal and social issues relating to individuals with an ASD diagnosis would be a great service to the bar and to society more generally.

24. See, e.g., *Asperger's: Symptoms and Signs*, WEBMD, <https://www.webmd.com/brain/autism/aspergers-symptoms-signs> (last visited Feb. 8, 2024); *What is Asperger Syndrome?*,

While aspects of bipolar disorder and ASD may appear to be consistent with certain of Elon Musk's attributes and behaviors, it is important to refrain from ascribing those attributes and behaviors to either condition, or the combined effect of both conditions. Yet, these mental health considerations are potentially relevant to the attorney-client relationship and must factor into our calculus of whether we would represent Elon Musk on a particular transaction or other matter and, if so, how we would undertake the representation.

II. WHAT CHALLENGES WOULD A CLIENT LIKE ELON MUSK BRING TO THE LAWYERING PROPOSITION?

Professional conduct rules, including state-adopted versions of the American Bar Association's *Model Rules of Professional Conduct* (the "*Model Rules*"),²⁵ and related guidance anchor the analysis of a business lawyer's professional obligations to their client.²⁶ Central to those obligations is the nature of the attorney-client relationship, including the business lawyer's roles as advisor and evaluator and the overall scope of representation.²⁷ These roles regularly invoke certain professional conduct obligations and norms that bear reconsideration in the context of a sometimes reckless, mercurial, bipolar, neurodivergent client like Elon Musk. However, two distinctive factors—Elon Musk's money and his publicly acknowledged health condition diagnoses (bipolar status and Asperger Syndrome)—further complicate the lawyer's role as advisor and evaluator.

AUTISM SPEAKS, <https://www.autismspeaks.org/types-autism-what-asperger-syndrome> (last visited Feb. 8, 2024).

25. MODEL RULES OF PRO. CONDUCT (AM. BAR ASS'N 2023).

26. See, e.g., Bruce A. Green, *Teaching Lawyers Ethics*, 51 ST. LOUIS U. L.J. 1091, 1095 n.18 (2007) (noting that sources of lawyer professional responsibilities include "disciplinary rules, judicial decisions, and relevant constitutional and statutory provisions"); Lucian T. Pera, *Guide to Resources and Materials on Professional Responsibility Issues*, 23 MEM. ST. U. L. REV. 589 (1993) (surveying "resources and materials . . . available to guide Tennessee lawyers").

27. See MODEL RULES OF PRO. CONDUCT Preamble ¶ 2 (AM. BAR ASS'N 2023) ("As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. . . . As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.").

A. Contextually Reconsidering Key Professional Conduct Rules

Acting in these all-important roles, the lawyer must refrain from advising or helping a client in committing fraudulent or criminal activity.²⁸ In advisory matters like the “going private” tweet and the Twitter acquisition, a lawyer representing or taking direction from Elon Musk is advising on future conduct (conduct that may constitute a crime or fraud) for which the lawyer would have liability if the client were to act in impulsive, unpredicted or unpredictable ways that generate criminal or fraud liability. The lawyer must recognize the possibility that they could be unwittingly participating in client conduct that constitutes a crime or fraud, notwithstanding any counsel afforded by the lawyer as to the risk of liability in proceeding. In that event, the lawyer’s path is clear:

[A]ttorney professional conduct rules require that an attorney withdraw from a representation rather than participate in a crime or fraud, inform the client that the lawyer cannot participate in criminal and fraudulent conduct, and take steps to ensure that the lawyer’s services are not used to facilitate a fraud.²⁹

Specifically, *Model Rules* 1.16(a)(1), 1.4(a)(5), and 4.1 ordain these actions.³⁰

Foundationally, professional responsibility rules and guidance relating to client communication, especially the lawyer’s obligation to describe or clarify matters for a client in connection with the client’s informed decision-making,³¹ also play important roles in business lawyering that may present challenges in representing Elon Musk or an entity for which he is a decision-maker. How can

28. *Id.* r. 1.2(d) (“A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law”).

29. Paula Schaefer, *Behavioral Legal Ethics Lessons for Corporate Counsel*, 69 CASE W. RESRV. L. REV. 975, 980–81 (2019) (footnotes omitted).

30. *Id.*

31. See MODEL RULES OF PRO. CONDUCT r. 1.4(b) (AM. BAR ASS’N 2023) (“A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”); see also *id.* preamble ¶ 4 (“A lawyer should maintain communication with a client concerning the representation.”).

a lawyer ensure that their explanations and ongoing communications are understood in a manner and to a degree that allows the client to make informed decisions and take informed actions when the lawyer is aware that the attention span or capacity for understanding of the client (or organizational client's representative) may be limited due to known behavioral attributes, mental health conditions, or related medications or treatments? An elevated degree of diligence and a heightened sense of awareness would appear to be required in these circumstances, along with a healthy dose of benevolence.³²

Answering client identity questions also would be important in undertaking legal work with Elon Musk. Elon Musk engages in sophisticated, complex business transactions both as a natural person (acting on his own behalf) and as the authorized representative of a business (a separate legal person). His ability to act in either an individual or representative capacity in business dealings—potentially moving from one role to another during the course of a transactional matter—makes it important for both him and any business lawyer working with him to be clear about the identity of the client—individual or entity—in a particular representation.³³ If, for example, Elon Musk wants to acquire Twitter and comes to legal counsel asking them to set up one or more acquisition vehicles through which to complete the transaction, it would be important to clarify whether legal counsel is representing Elon Musk or the acquisition vehicle.

In the 2022 trial involving allegations of criminal fraud, former Theranos, Inc. CEO Elizabeth Holmes raised questions about privilege waivers based on a client identity argument.³⁴ Specifically, Holmes asserted that the law firm representing Theranos—a Delaware corporation and separate legal entity—also

32. Of course, diligence is required in any client representation. *See id.* r. 1.3; *see also id.* r. 1.3 cmt. 1 (“A lawyer must. . . act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf.”).

33. *See id.* r. 1.13.

34. *United States v. Holmes*, No. 18CR00258EJD1NC, 2021 WL 2309980, at *1 (N.D. Cal. June 3, 2021), *objections overruled sub nom.* *United States v. Holmes*, No. 5:18-CR-00258-EJD-1, 2021 WL 2711230 (N.D. Cal. July 1, 2021) (“The government seeks to have certain Theranos corporate documents deemed admissible for trial against Defendant Elizabeth A. Holmes. Holmes opposes admission asserting that the documents are confidential communications with her attorney subject to her individual attorney-client privilege.”).

was representing her on an individual basis.³⁵ Accordingly, Holmes argued that Theranos could not alone waive the attorney-client privilege.³⁶ Her argument ultimately was unsuccessful.³⁷ Regardless, the very controversy reminds us that, especially in situations involving an iconic CEO like Elon Musk—one whose identity is tied so closely to the firm they lead—it behooves both legal counsel to the firm and any individual acting on behalf of the firm to clarify the identity of the client in the attorney-client relationship at the outset and throughout the representation.

These generally applicable—and important—professional rules offer helpful (even if not dispositive) direction and support in navigating the representation of Elon Musk and other similar business clients whose behavioral norms may create legal advisory challenges. Yet, there are other factors at play in representing Elon Musk—factors relating to him that both make the contextual application of professional conduct rules more challenging and implicate more specialized professional conduct rules. Two key factors of this kind, as noted above, are Elon Musk’s extraordinary financial wealth (together with the related effective control he exercises over the businesses he owns or manages³⁸ and the general industry and economic power he may wield³⁹) and his bipolar/neurodivergent status.

B. Unusual Client Factors: Financial Wealth/Prominence and Mental/Neurobiological Status

Representing Elon Musk means, among other things, providing legal counsel to a multibillionaire public figure businessman—the head of multiple popular businesses in exciting

35. *Id.* at *2 (“Holmes opposes the government’s motion on the grounds that Boies and BSF jointly represented her and Theranos.”); see Stephen L. Carter, *Theranos Trial: Why Did Elizabeth Holmes Lose Attorney-Client Privilege?*, BNN BLOOMBERG (June 17, 2021), <https://www.bnnbloomberg.ca/theranos-trial-why-did-elizabeth-holmes-lose-attorney-client-privilege-1.1618231>.

36. *Holmes*, 2021 WL 2309980, at *1.

37. *Id.* at *4.

38. See *Tornetta v. Musk*, No. 2018-0408-KSJM, 2024 WL 343699, at *44–*61 (Del. Ch. Jan. 30, 2024) (finding Elon Musk exercised transactional control over the approval of his compensation plan at Tesla, Inc.).

39. See *How Worried Should You Be About Elon Musk’s Superpowers?*, THE ECONOMIST (Oct. 6, 2022), <https://www.economist.com/leaders/2022/10/06/how-worried-should-you-be-about-elon-musks-superpowers> (describing Elon Musk not only as “a gifted technologist” and “fabulously rich,” but also as a person who “has every intention of using the remarkable technological capabilities under his control to change the future course of history.”).

industries. Taking on a client of this kind can be a source of personal and professional pride and status for an attorney. A client of that caliber not only promises the likelihood of bringing in solid, collectible legal fees but also may generate for the lawyer an enhanced positive public reputation that may expand their capacity to attract new clients.

Yet, the representation of Elon Musk also means providing legal counsel to a person with acknowledged mental and neurobiological health conditions. These conditions—bipolar disorder and ASD (originally diagnosed as Asperger Syndrome)—are not well understood in the legal profession. Nevertheless, we have a general idea that they may impact client decision-making.

How does a lawyer weigh these omnipresent factors in determining whether to represent Elon Musk or continue in representing him once legal representation has been undertaken? There are no easy answers to that question. However, exploring each factor in greater detail seems to be a necessary—although perhaps insufficient—component in navigating those representation decisions.

1. *Client Financial Wealth and Power*

As the song lyrics go, “money changes everything.”⁴⁰ A unique challenge in representing or advising people like Elon Musk is the incredible amount of money (and the related perceived power and social standing) involved in working with them. Clients of course, have decision-making autonomy; legal counsel provide advice and act as agents for the client in performing related services. Nevertheless, representing a powerful client can impact the nature of the attorney-client relationship.

The powerful client has maximum autonomy. The lawyer has no control over the client and cannot exercise any dominion over the attorney-client relationship. The lawyer’s ability to provide adequate, competent representation is threatened; without truthful and complete information, the lawyer’s representation is unlikely to be optimal. Worse yet, the lawyer knows that, after the fact, he will be critiqued for pursuing a strategy

40. CYNDI LAUPER, *Money Changes Everything*, on SHE’S SO UNUSUAL (Portrait Records 1983).

shaped and governed, in large part, by the client's ungovernable choices.⁴¹

Individual lawyers will undoubtedly process these potential implications differently based on, for example, their professional self-actualization, confidence, and capacity for risk.

Regardless, there is another important consideration in representing a wealthy and prominent client that is worthy of reflection. A lawyer's self-interest in the representation (which may not even be recognized by the lawyer) may cause them to work to find a way to facilitate unlawful—even criminal or fraudulent—conduct to stay in the good graces of a wealthy, well-known, often revered senior corporate officer and be able to continue to work for the corporation.⁴²

These corporate advisors have an immediate financial incentive to give the corporate client (via that executive) all of the zealous-advocacy-within-the-arguable-bounds-of-the-law the company can afford. Corporate advisors keep their jobs . . . when they keep executives happy; they do this by finding ways to implement corporate executives' plans, and not by saying no.⁴³

The enticement of working with a star-power executive for a high-flyer firm can inject cognitive bias into the lawyer's judgment as to how to best advise a client contemplating action that raises the specter of criminal or fraudulent conduct.⁴⁴ One can see how a lawyer might, for example, stretch the bounds of professional responsibility to justify high-risk conduct undertaken by Elon

41. Margaret Raymond, *Fool for A Client: Some Reflections on Representing the President*, 68 *FORDHAM L. REV.* 851, 865 (1999).

42. See Schaefer, *supra* note 29, at 986 (“[A]ttorney self-interest can significantly—but invisibly to the attorneys—influence the poor advice they provide their corporate clients contemplating fraudulent conduct.”).

43. *Id.*

44. *Id.* (“While other situational pressures and biases . . . also play a role, the corporate lawyer's self-interest plays a role in the attorney failing to provide advice that the actual client—the corporation—had an interest in receiving.”); John P. Heinz, *The Power of Lawyers*, 17 *GA. L. REV.* 891, 899 (1983) (“The corporations that are the clients of corporate law specialists have vast wealth and social power; though their lawyers are also wealthy, as lawyers go, and enjoy high social status, the power of the corporate clients will outweigh that of their lawyers. The lawyers are often dependent upon receiving repeat business from a few, large corporate clients, and they will thus be reluctant to do anything that would offend those clients.”).

Musk—conduct that may be borne of his creativity and impulsivity.

2. *Client Psychological Condition*

A lawyer's professional relationship with Elon Musk also may be complicated by his self-confessed bipolar status and Asperger Syndrome diagnosis.⁴⁵ A business lawyer's knowledge that their client has a mental or neurobiological disorder increases the lawyer's need for vigilance in the attorney-client relationship. In particular, the realization that a client has a disability or is unwell may implicate or require engagement with Rule 1.14 of the *Model Rules*⁴⁶ and its commentary⁴⁷ or other ethical guidance relating to clients with diminished capacity. Yet, it is far from clear that bipolar depression or an ASD diagnosis—in general or in any specific instance—indicates or triggers diminished capacity.⁴⁸

45. See, e.g., Walsh, *supra* note 14; Minda Zetlin, *I Knew Before He Said It That Elon Musk Has Asperger's. Here's How I Could Tell—and Why It's Helpful*, INC. (May 22, 2021), <https://www.inc.com/minda-zetlin/elon-musk-aspergers-self-test-entrepreneurs-temple-grandin.html>.

46. See MODEL RULES OF PRO. CONDUCT r. 1.14(a) (AM. BAR ASS'N 2023) (offering counsel on clients whose “capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason”).

47. See, e.g., *id.* r. 1.14(a) cmt. 1 (“The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters.”); *id.* r. 1.14(a) cmt. 6 (offering guidance to legal counsel in “determining the extent of the client's diminished capacity,” noting that “[i]n appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician”).

48. See, e.g., Tania Gergela & Gareth S. Owen, *Fluctuating Capacity and Advance Decision-making in Bipolar Affective Disorder—Self-binding Directives and Self-determination*, 40 INT'L J.L. & PSYCH. 92, 93–94 (2015) (describing “fluctuating capacity” in people with bipolar disorder); Irwin P. Levin et al., *Extending Decision Making Competence to Special Populations: a Pilot Study of Persons on the Autism Spectrum*, 6 FRONTIERS PSYCH., Apr. 27, 2015 at 1, 2, (“Persons with ASD have extremely variable cognitive and behavioral functioning abilities and this influences how the core diagnostic symptoms manifest. . . .”); F.C. Murphy et al., *Decision-making Cognition in Mania and Depression*, 31 PSYCH. MED. 679, 686–89 (2001) (describing research results indicating differences in decision-making (including decision-making capacity) in manic and depressed individuals); Enric Vincens Pons et al., *The Capacity of Schizophrenia and Bipolar Disorder Individuals to Make Autonomous Decisions About Pharmacological Treatments for Their Illness in Real Life: A Scoping Review*, 3 HEALTH SCI. REP., Sept. 2020 at 1, 10–11, (noting, in the context of treatment decision-making, that while the understanding of a person with bipolar disorder may be impaired, understanding may be improved with certain interventions and any loss of decision-making capacity is temporary); Mikle South et al., *Enhanced Decision Making and Risk Avoidance in High-Functioning Autism Spectrum Disorder*, 28 NEUROPSYCH. 222, 222–23 (2014) (describing conflicting studies on the decision-making capacity of individuals with ASD and positing that, while ASD-related decision-making impairments “could impair decision making in some situations (including social situations),

Nevertheless, the public nature of Elon Musk's bipolar disorder and Asperger Syndrome diagnosis offer us the opportunity to push further and inquire about whether these conditions may impact his decision-making as a client. A non-expert's review of some of the literature indicates that decision-making effects have been observed. Bipolar individuals experience manic and depressive states, and each may have an impact on decision-making.⁴⁹ "During periods of mania, people frequently behave impulsively, make reckless decisions and take unusual risks."⁵⁰ The overwhelmed feeling that accompanies depressive states may result in suboptimal decision-making.⁵¹ Individuals with autism spectrum disorder diagnoses (including those that may have been diagnosed with Asperger Syndrome) may make more logical decisions than their neurotypical peers,⁵² but they also may face a different set of challenges than other decision-makers.⁵³

an emphasis on rational as opposed to affective cues may lead to more logical and more successful decisions at other times"); Lydia Vella et al., *Understanding Self-reported Difficulties in Decision-making by People With Autism Spectrum Disorders*, 22 *AUTISM* 549, 555 (2018) (reporting, for example, that study participants with ASD demonstrated significantly longer decision-making in certain decision-making, and a tendency to make decisions with a higher probability of being correct in others).

49. See Murphy et al., *supra* note 48, at 691 (summarizing study results indicating decision-making similarities and differences in manic and depressive participants with bipolar disorder).

50. *Bipolar Disorder*, NAT'L ALL. ON MENTAL ILLNESS (Aug. 2017), <https://www.nami.org/About-Mental-Illness/Mental-Health-Conditions/Bipolar-Disorder>.

51. *Id.* ("When people are depressed, even minor decisions such as what to eat for dinner can be overwhelming.")

52. See George D. Farmer et al., *People With Autism Spectrum Conditions Make More Consistent Decisions*, 28 *PSYCH. SCI.* 1067, 1073 (2017) ("People with autism spectrum conditions made fewer context-induced preference reversals than did neurotypical individuals. That is, they made more conventionally rational decisions."); Punit Shah, *People With Autism Make More Logical Decisions*, *THE CONVERSATION* (Oct. 13, 2016), <https://theconversation.com/people-with-autism-make-more-logical-decisions-66946> ("[P]eople with autism use a different strategy when making decisions. Instead of using intuition and emotion like people without autism, . . . they viewed differently framed, but numerically equivalent, options more rationally than typical people.")

53. South, *supra* note 48, at 227 ("The current study indicates that for many young people with ASD their decision making is typified by avoidance of situations of risk or uncertain outcome."); Vella et al., *supra* note 48, at 557 ("[C]onsistent with the subjective decision-making difficulties reported, we found that, compared to a neurotypical control group, this sample of intellectually able adults with ASD demonstrated slower decision-making speed, a tendency to sample more information prior to making decisions"); Lee A. Wilkinson, *Decision-Making Problems in Adults with ASD*, *LIVING AUTISM* (Jan. 16, 2013), <https://livingautism.com/decision-making-problems-adults-asd/> (reporting, based on study results, that "compared with neurotypical individuals, individuals with ASD experience greater difficulty with decision-making. Decision-making in ASD was associated with anxiety, exhaustion, problems engaging in the process, and a tendency to avoid decision-making").

Armed with this knowledge and an awareness of a particular client's bipolar depression or neurodivergence (taking into account any pharmacological or other interventions that may impact decision-making), lawyers can gauge their communications to better suit the decision-making strengths, and may be able to overcome the decision-making challenges, of that client.

As a bipolar individual with Asperger Syndrome, Elon Musk also highlights the lawyer's need to assess whether a client's mental health or neurodivergence constitutes a disability. Neither condition is automatically nor conclusively disabling, although either may constitute a disability.⁵⁴ The existence of a client disability creates an increased potential for lawyer misconduct⁵⁵ in this type of setting. Specifically, it is important in this regard to note that professional misconduct includes "conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of . . . disability . . . in conduct related to the practice of law."⁵⁶ The commentary accompanying Rule 1.14 of the *Model Rules* offers important counsel, reminding us that "[t]he fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect."⁵⁷ Patience and a caring nature, as well as a variety of attributes of lawyer leadership (e.g., emotional intelligence, cultural competence, cultural humility) may be desirable personal and professional strengths in the representation of a client with an acknowledged bipolar condition or neurodiversity disorder—regardless of whether the condition represents a disability.

Lawyers may be able to take some cues in this regard from health care research. Some researchers studying bipolar disorder and ASD from a health care provider perspective address patient decision-making autonomy in their work. Specifically, they suggest certain ways of assisting patients with bipolar disorder or ASD in capable decision-making. For example, researchers studying the impaired understanding of disease-associated and treatment-related information in bipolar individuals note that their level of

54. See Aiyana Bailin, *Clearing Up Some Misconceptions About Neurodiversity*, SCI. AM. (June 6, 2019), <https://blogs.scientificamerican.com/observations/clearing-up-some-misconceptions-about-neurodiversity/> ("Autism and other neurological variations (learning disabilities, ADHD, etc.) may be disabilities.").

55. See MODEL RULES OF PRO. CONDUCT r. 8.4. (AM. BAR ASS'N 2023).

56. *Id.*

57. *Id.* r. 1.14 cmt. 2.

understanding “can be easily improved by adopting measures such as repeating and redisclosing the missed information or using enhanced information procedures.”⁵⁸ Also, researchers recommend that individuals with ASD may benefit from strategies that include “addressing general stress and anxiety present at the time of the decision; providing additional time; minimizing irrelevant stimuli; presenting closed questions; providing encouragement and reassurance; and acknowledging the person’s strengths in decision-making.”⁵⁹ As additional work in this area emerges, lawyers are well served in becoming familiar with interventions that may enable their bipolar and neurodivergent clients to engage in effective decision-making.

Overall, legal counsel and clients alike may benefit from a better understanding of the ways in which a client’s mental or neurobiological status may impact the client’s ability to socialize, acquire knowledge, focus, or be attentive, or ways in which these conditions may affect the client’s mood.⁶⁰ These impacts can have significant effects on the attorney-client relationship. More specifically, broader knowledge of bipolar disorder and neurodiversity (and inquiries into specific forms of these conditions and their individualized manifestations) is seemingly essential to the task of providing meaningful, competent legal representation to bipolar and neurodivergent clients, including Elon Musk.

III. CONCLUSION

Representing Elon Musk would be a challenging professional proposition, raising both standard and more unusual professional responsibility questions. In taking on that representation, I would commit to acquiring a more comprehensive understanding of Elon Musk himself—which would require learning more about his personality, bipolar condition, and neurodiversity. I would carefully consider the ramifications of what I learn as they relate

58. Pons et al., *supra* note 48, at 10.

59. Lydia Luke et al., *Decision-making Difficulties Experienced by Adults With Autism Spectrum Conditions*, 16 *AUTISM* 612, 619 (2011).

60. See Bissonnette, *supra* note 21, at 5–12 (setting forth “strengths of the Asperger mind” as well as social communication, organizational, and sensory challenges common to people with Asperger’s Syndrome); M. Suzanne Hartness & John D. Bowers, *Neurodiversity in the Practice of Law*, *LAW PRACT. MGMT.* (Nov. 1, 2020), https://www.americanbar.org/groups/law_practice/publications/law_practice_magazine/2020/nd20200/nd20hartnessbowers/ (“[M]y ability to focus yields catching something really quickly”).

to client communication and overall service. The task would require, among other things, patience, mental toughness (including in combatting any cognitive biases emanating from Elon Musk's affluence and influence), and empathy.

In sum, representing Elon Musk would entail a conscious exercise of lawyer leadership. By understanding how each of us most effectively leads (knowing our individual character strengths and appreciating our overall leadership capabilities)—i.e., the leadership superpowers we each bring to the table—and by honing our knowledge of the professional conduct rules we must follow and the substantive legal rules applicable to the client's transaction or matter, we can more confidently proceed with the representation. In general, representing Elon Musk also requires a lawyer to engage principles of servant leadership.⁶¹ “Ultimately, lawyering is a delicate balancing between a constantly evolving world, and the fundamental principles that define our legal system. It calls upon your compassion as well as your intellect, your heart as well as your head. . . . [C]aring is as much a part of the legal profession as intelligence. . . . [I]t is every lawyer's responsibility in every setting to serve others.”⁶²

61. See Zachary Atherton-Ely, *Demonstrating Value to A Corporation As In-House Counsel*, 43 MITCHELL HAMLINE L. REV. 1003, 1004 (2017) (“The servant-leader takes care ‘to make sure that other people's highest priority needs are being served.’” (citing to Robert K. Greenleaf, *The Servant as Leader* 6 (1970))).

62. Karen J. Mathis, President, Am. Bar. Ass'n, Keynote Address at Drexel University College of Law Inaugural Celebratory Dinner 3 (Sept. 27, 2006) (remarks as prepared available at: http://web.archive.org/web/20080708233514/http://www.abanet.org/op/mathis/speeches/drexel_univ_dinner_speech_0906.pdf).