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PERSPECTIVE

In the Gray

Litigators at Kibler Fowler & Cave specialize in matters without clear answers.

By Shane Nelson
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From left: Matthew J. Cave, Michael D. Kibler and John D. Fowler | Emilio Aldea / Daily Journal

Trial attorney Michael D. Kibler doesn't handle many cases where the details are plainly black and white.

"You don't need me for a case where the facts and the law are a hundred percent on your side or a hundred percent against you," Kibler said. "Where I've made my living throughout my entire career is in the area of gray – the gray area where the lawyering matters, where the skill of the lawyers, the strategy, the chess moves can be outcome determinative because the facts are not one hundred percent clear."

Kibler spent 18 years at Simpson Thacher & Bartlett LLP, starting out in the firm's New York office before moving to Los Angeles, where he tackled financial and investment litigation along with many real estate disputes.

"I frankly never feel more alive professionally than when I'm standing up in the well of a courtroom," Kibler said, explaining that the earlier stages of litigation can often feature a great deal of nonsense. "People take indefensible positions. Witnesses in depositions shade the truth or feign a lack of memory about facts relevant to the case. A lot of bullshit goes on during the course of litigation – both out of the lawyers' mouths and out of the clients' mouths. My experience has been all of that falls away when the trial starts."

Kibler said he's always found jury practice especially rewarding, in part, because he sees it as a zero-sum game that typically exposes the truth.

"At the end of the trial, the jury is going to say – one way or the other – who absolutely wins and who absolutely loses," he explained. "There's just six, eight, 10, 12 folks off the street sitting in the box who are assessing credibility, who are developing as they watch the testimony, a kind of innate sense, a gut-level sense of who's right and who's wrong. And all the bullshit that goes on in litigation oftentimes falls away. Maybe I sound naive, but my experience has been the truth comes out at trial, and that's very gratifying and satisfying to me."

Early in 2020, Kibler joined forces with attorneys John D. Fowler and Matthew J. Cave to launch a Los Angeles based boutique, where the trio focused largely on litigation involving financial, investment, real estate and entertainment disputes. Kibler said the move was motivated, in large part, because he was having a hard time competing for clients with what he called low-seven-figure or mid-eight-figure cases while charging Simpson Thacher's hourly rates.

"It just seemed like a good fit to launch a boutique where we can provide these high-end, relatively sophisticated commercial litigation services on a lower-cost platform than big law firms," Kibler

said. "The laugh line is that we opened our brand-new office on January 1st, 2020, and we closed it in March 2020 when the pandemic hit."

Although a great deal of the firm's work is still done remotely, Kibler Fowler & Cave LLP is home to 12 attorneys today and features offices in Los Angeles, New York, Philadelphia and New Jersey. Founding Partner Fowler, whose practice focuses frequently on entertainment and intellectual property litigation as well as blockchain and cannabis disputes, said striking out with Kibler and Cave was a terrific decision.

"I couldn't imagine two better partners, and I don't say that lightly," Fowler insisted. "We get along tremendously well."

Fowler said the frequent change in his practice areas is the element of his work he appreciates most.

"The problems that arise in these industries tend to really keep the brain cells expanding," he explained with a chuckle. "Particularly in cannabis and blockchain – the law changes very quickly, and if you're not on top of it, then you're way behind. … And you have the ability to make creative arguments that are more difficult to make in areas where there's 50 years of case law. And I just really like that ability to make new, interesting and novel arguments."

Founding partner Cave, meanwhile, worked early on in his career with Kibler as a litigation associate at Simpson Thacher, and he said he jumped at the opportunity to team up again with his mentor. Describing his practice as bridging the gap between Kibler and Fowler, Cave often handles real estate contract disputes along with entertainment-related intellectual property cases, including music industry copyright infringement matters.

"I've been able to work with Mike, representing some big clients similar to what we would've been doing together when we were at Simpson, but we're just doing it more efficiently now," Cave said. "We can go toe to toe with the biggest firms in LA and the country, and that's been really fun."

Earlier this fall, Kibler Fowler & Cave negotiated a confidential settlement on behalf of its client Toll Brothers, Inc. in a breach of contract dispute against Chubb subsidiary Ace American Insurance Company. The luxury home builder had two large California projects damaged and delayed by the intense storms and resulting flooding that hit the state in late 2016 and early 2017, according to Kibler.

"Toll Brothers had insurance coverage for not just the physical damage to the properties, but also the economic damage caused by the delay in the completion of those projects," he explained. "But Ace denied insurance coverage for the delay, and that was a big number for Toll Brothers."

In July of 2020, Toll Brothers sued Ace for $42.7 million, alleging breach of contract and bad faith. *Toll Brothers, Inc. v. Ace American Insurance Company*, 01152770 (Orange County Super. Ct., filed Jul. 24, 2020).

"We were literally waiting to get called to show up the next day and pick a jury," Kibler said of the last-minute settlement. "That I think was a prototypical case that I launched this firm to handle. It was pretty complicated, pretty sophisticated with a decent amount of money at issue, but not hundreds of millions of dollars."

Arnold & Porter Kaye Scholer LLP attorney Ed Aro tried a real estate case against Kibler in front of a jury in 2010 and described him as an "exceptional talent."

"One of the cross examinations he did in the course of that case was the best cross I've ever seen in court by a pretty wide margin," Aro said, adding that Kibler is terrific in front of a jury.

"For somebody who has a fancy pedigree, he's got a very down-to-earth style. … I wouldn't call it exactly salt of the earth. He does wear cufflinks," Aro said with a laugh. "But he comes across as a regular, credible, amiable guy in a way that I think is great in front of a jury."

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