

Fireside Chat with Our Institute Founders

Program: 50th Annual Institute on Securities Regulation

Speaker(s): Arthur Fleischer, Jr., Robert H. Mundheim

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DAVID LYNN: OK. That was a very dramatic introduction to our panel. It's going to be hard to live up to that intro. But as I'm sure you're aware now, this is the 50th Annual Institute. And we're very fortunate to be here to celebrate that, and even more fortunate to be here with the co-founders of this Institute, Arthur Fleischer, Jr. and Robert Mundheim.

Arthur is senior counsel resident in the New York office of Fried, Frank. And he joined that firm in 1958 and became partner in 1967. As many of you know, Arthur's practice has involved mergers and acquisitions and securities law.

He has also served as an executive assistant to the chairman of the SEC from 1961 to 1964. And we're really pleased to have Arthur join us today to offer some reflections on how this Institute came about.

Robert Mundheim is of counsel to Shearman & Sterling. And he's a professor of corporate law and finance at the James E. Rogers College of Law at the University of Arizona. And Bob has had many other roles that if we read them all, we'd probably be done with our 50 minutes here.

But suffice it to say, Bob is very well-known to everyone as one of the greats in the securities law practice. And we're very fortunate to have Bob as well join us today to offer some insights into how this Institute came about, and what it was like.

So to put our discussion in context, I kind of want to take us back to 1969, the first year when the Annual Institute started. And it was really a very dynamic time in 1969. We always think today's a very dynamic time, but when you look back at that year, it was just so many things happening.

From a securities law perspective, you had the enactment of the Williams Act in 1968, which obviously, as everyone knows, required disclosure and procedural restrictions in connection with cash tender offers and beneficial ownership reporting. In March of 1969, you had the Wheat Report, which looked at the disclosure process and the commission's administrative practices under the 33 and 34 Act and was really sort of instrumental and foundational really for the development of the integrated disclosure system.

You had in the 1969 the SEC started requiring management discussion analysis in disclosures, which they still don't think we get it right, even now we've been writing it for all that time. The ALI had appointed Louis Loss to write the Federal Securities Code, to be the reporter for the Federal Securities Code Project back in 1969, which was a project that spanned most of the 1970s. And then Congress failed to get that to the finish line in the 1980s.

And so that was sort of a lot happening back then in terms of the development of the securities laws, really sort of transformational types of activities. But that wasn't all that was happening in 1969.

There were a lot of other amazing events, including Neil Armstrong becoming the first human to set foot on the surface of the moon, the premiere of two of my favorite movies of all time, Chitty Chitty Bang Bang and The Love Bug. The show Sesame Street premiered, which without that, I wouldn't have learned anything about the alphabet and counting and stuff like that.

The first message was sent between two people through ARPANET in 1969, which was the precursor to the internet. So unfortunately, that set us down the path that we're on today with Twitter and everything like that.

Richard Nixon was sworn in as president in 1969. The Beatles recorded Abbey Road, which was the last album they recorded together. And Black Sabbath performed their first show, which sort of marked the transition from the '60s to the '70s.

And lastly, Woodstock, you know, the Yasgur farm in Woodstock, New York attracted 350,000 music fans. And then here in New York City, maybe several thousand, or at least 1,000 securities law fans, were attracted to the very first Institute. And so I'd like to first ask Arthur and Bob what brought about the initiation of the first Annual Institute.

ARTHUR FLEISCHER, JR: Well, let me, by way of background, Bob and I were both employed by the SEC in the early 1960s. And at that point, the chairman of the SEC was Bill Cary, who had been a professor at Columbia and who was visiting at Yale Law School.

I took a course with him. And then I was subsequently writing a book with him, which was never completed or published. And when we finished at the SEC, upon the assassination of the president at that time, I went back to Strasser, Spiegelberg, now Fried Frank, and Bob was a professor at the University of Pennsylvania.

We both participated at that time in continuing legal education programs, including at the PLI. I was also a tax lawyer. And for some of the younger lawyers here, we didn't exactly specialize when we got out of law school. I mean, if you were a corporate lawyer, you did M&A, public offerings, financing, et cetera.

And then on top of that, I did tax law. And one of the things I was impressed with was that NYU, which had a very famous tax practice, that is teaching people about federal income taxes, every year published an Institute on Taxation with many of the leading practitioners. And Bob and I thought it made sense to try that same concept in the field of corporate and securities regulation. We brought the idea to the Practicing Law Institute, and they agreed.

ROBERT H. MUNDHEIM: I was a young law professor, so I reflect back I guess I must have been 15, right? Teaching securities regulation. And I thought that co-chairing a program with experienced practitioners and regulators would enhance my knowledge and be a benefit to my students.

Generally, bringing people together to think about issues tends to be rewarding. And I think it's one of the great rewards of this Institute. And therefore, a three-day program in which the audience and panelists would interact would also be a big plus.

ARTHUR FLEISCHER, JR: And I think what were the objectives that we had in mind. Well, obviously, it was going to be an annual program on developments in securities regulation. And we appreciated from the start that even with a two and 1/2 day program, it wasn't going to be all inclusive. The field was just too broad, too dynamic.

So the effort would be to focus on those elements that were important and concentrate on them in an intensive fashion. And also part of it was to promote a dialogue among the panelists. It wasn't designed to be a sermon for 30 minutes and then a few comments, but have a more abrupt feeling to it. And people interacting and discussing what these developments meant.

And I think one of the critical underlying points, and the first things you learn as a practicing lawyer, is how you integrate legal developments into your practice, both in terms of the advice you give to your clients and the formulation of agreements. And this, of course, became very pointed and was a very emphatic need in the early days of the takeover era where rules were being adopted with frequency. And there were considerable number of judicial opinions that had to be integrated into your practice. And there was not necessarily any extensive background on this.

DAVID LYNN: So one of the things, certainly the Institute has been held at various locations over the years around New York, where was the Institute first held? And what kind of turnout did you have?

ROBERT H. MUNDHEIM: Well, the first program was held at Kent Town Hall. And I don't know if many of you know Town Hall. I can see a few smiles and recollections.

And in the introduction to the first volume, which recorded the first Annual Institute, I wrote a preface in which I said there were 1,000 people who attended. As I've thought about it in connection with this program, I thought, well, maybe there's a little Trumpian quality to that recollection. You'll remember, the president said that more people attended his inauguration than had ever attended any inauguration.

And then I thought a little bit more about it and thought, well, maybe there's a little confusion about the audience. Because as we were doing the last panel, a band began. And I mean a musical band began to appear on the stage behind us because the program immediately after the Annual Institute was a band concert. And I'm not sure that whether or not all the 1,000 that I saw were there for the PLI Annual Institute or for the concert.

DAVID LYNN: So in terms of comparing then and now, what were some of the features of the Institute back then? And how does that compare today and differ from what we do today?

ROBERT H. MUNDHEIM: Well, one of the first things that strikes me is that on the first Annual Institute, which ran Wednesday, Thursday and Friday, so it's the same time period, we had 27 panelists, including moderators. This program today has 80, maybe a little more than 80.

Arthur and I chaired each panel each day all the panels, we chaired. Today, different people get assigned responsibility for each panel. And that really meant that we had to think about how things integrated with each other. And we also had to be prepared with questions for each panel so that we could drive whatever we thought ought to be the theme when we had organized it.

I think also the early Institutes had a little different approach. In the first Institute, there was I think a fuller opportunity for discussion of a theme or subject. As I went back and looked at the first book, seven chapters are on private placements. So one really had an opportunity to think about private placements and the development of that subject in a pretty comprehensive way.

Five were on control persons and the duties surrounding control persons. So half the Institute, 12 chapters, 12 panels, if you will, were on two subjects.

Another difference, the first Institute had four academics. So that's four out of 27 were academics. The second, where the number of panelists did not increase, there were five academics. In this program, you've got one academic. And that may explain a little bit of a difference in approach.

Let me bring you back. Professor Bill Andrews at Harvard Law School and Noyes Leech at Penn had written very thoughtful articles about the sale of control. And the dialogue started by those articles was then carried forward in a discussion with practitioners.

I'd written my 10-year article on suitability, a relatively new concept at the time. And I still can remember Tom O'Boyle, partner at Sherman, and Marty Lipton, Marty who later became a co-chair of this Institute, exploring that subject in a lively fashion. And then Arthur, Jack Murphy, then a young I think Cleary associate, and I had written an article on market information. And that was a new concept and that the concepts developed in that article, again, were explored in a very lively discussion.

ARTHUR FLEISCHER, JR: And let me, focusing a bit more on subject matter, I do want to point out in the second Annual Institute we began a discussion of professional ethics. And I think that tradition has continued to this day. On this panel on this year, there are two extensive ethics analysis in this year's program.

ROBERT H. MUNDHEIM: Let me-- I just want to-- one thing that's important about that point of Arthur's. That introduction of ethics programs as part of a substantive law program was done before ethics courses were mandatory. So in other words, in that sense, it's a real innovation.

ARTHUR FLEISCHER, JR: And it's also, it's a tribute to Bob's status. He's one of the country's leading experts on professional ethics. If you think about what else there was, and Bob has given a general outline of what was available in the first Annual Institute, I think now there are many more discrete topics. And the discussions are more granular.

For example, the subjects this year include, and I don't understand any of these, but direct listings, shelf takedowns, cryptocurrency offerings, and responding to SEC staff comments on M, D & A. And I thought that was mother, dad, and adults. I didn't know what that was.

And these, I think, and properly so, reflect a laser-like focus on issues of moment for the practitioner. And I think the discussions have reached a very sophisticated level in dealing with complex issues.

DAVID LYNN: So in terms of the panelists back at that first Institute, who showed up to share their knowledge?

ARTHUR FLEISCHER, JR: Well, I think one of the interesting points, and I don't know how common or pervasive it was, but on the first Annual Institute, there were two staff members of the SEC, Irv Pollack, who is a legendary head of trading and markets, and Charlie Shreve, who is the head of corporation finance. And Lou Young, who was then the regional administrator at New York, spoke, as well as Frank Weed, a commissioner.

So this started, I think, a happy tradition of having SEC personnel participate. And I believe there are about nine of them in this year's program, the 50th year, in addition to former SEC staff, former commissioners, and indeed former chairpersons, as well as representatives of other government agencies, including the US Attorney and the Commodities Futures Trading Commission.

Now, Bob, do you want to comment on?

ROBERT H. MUNDHEIM: One thing about the Institute today is that it's certainly much more inclusive than when we started. I mean, I'm embarrassed to tell you this, but the first Annual Institute did not have any women panelists. And that tradition carried through until the eighth Annual Institute. And at that point, Allison Gray, who taught at UCLA, was invited. And so she was the only woman on that Institute.

And later, Mary Beech, who was an associate director of corporate finance, was invited. . Today, on the program today, there are 30 women. So you've come a long way.

ARTHUR FLEISCHER, JR: Yeah, but that was a reflection of what was going on in the legal profession, and a complete change in the status of women in when we began and where we are now.

ROBERT H. MUNDHEIM: No, you're absolutely right about that, but it also was never a thought of ours that we had to reach out and look to see if there weren't women. So I mean, I just wanted to not give the sense that we were really perfect in every respect.

ARTHUR FLEISCHER, JR: No, some of these editorial comments belong to the particular speaker.

ROBERT H. MUNDHEIM: Now, the other thing that was interesting in looking at the original panels, only three of our 27 panelists did not live on the east coast. And two of those three who didn't live on the East Coast were former commissioners, and therefore, they'd certainly worked on the east coast. And that's where we got to know them.

And I think that's one of the limitations of having two young east coast chairs of the Institute, that our kind of knowledge of people and resources much more limited than yours, David.

DAVID LYNN: So in terms of today we're celebrating this 50th Annual Institute, what has really made this Institute so enduring? How has it lasted for all this time?

ARTHUR FLEISCHER, JR: Well, I think a simple answer is really appropriate. And I think the Institute is still around because it's basically delivered what its original purpose was-- focus on debate and discussion of important developments in securities regulation and corporate law. And all of this on a high expert level.

And this has essentially worked. This is obvious because of the experience, skills, and efforts of the participants, the moderator, and the panelists, and the process starts with the chairperson selecting topics of important. And this is facilitated by a dialogue with members of the advisory committee, whose names are listed in the materials distributed.

And the participants are then chosen. And you can readily note they come from a variety of places. The three co-chairs are from Boston, New York, and Washington. And as might be expected, Washington and New York dominate this year's panelists.

However, there are representatives from Philadelphia, Detroit, Palo Alto, Wilmington, Chicago, and Fort Myers. And to be sure, the participants change basically every year. I mean, there are repeat performers, but there are a lot of new faces. And what is steady is the selection of individuals expert and experience in the areas that each will discuss.

DAVID LYNN: Is there anything about today's conference comparing it to the years past that you miss certain features that were part of the conference in the past?

ROBERT H. MUNDHEIM: I think the thing that I miss most are the books. And I don't mean the--

[APPLAUSE]

--I don't mean the fat little outlines. I mean, the edited versions of the conference, which appeared after each of the first 13 Institutes. Those books are roughly 400 to 500 pages long without the appendices. And they are an edited transcript of what was said.

Now, I know, David, you will say, oh, but we have, you can get that digitally, so you can actually listen to what people said. Well, this is different. And I understand that I like to read more than perhaps some of you. And I like to read it on paper.

But what we did on those Annual Institutes, you had the type transcript. And then we would have a young lawyer go through the transcript and carefully edit it to sometimes sharpen points, sometimes expand them, see that they were better integrated.

They would then go to the panelists and people were asked to review those, and people did that. And so that you have, at the end, a kind of thoughtful recreation of what was discussed. And it becomes a really valuable research tool and reflection tool that I think we don't have today.

And I mean, I think back about people-- Don Glaser, Don Glaser, you know, illustrious career at Ropes & Gray. He's the leading expert on opinions and has written books on that. Don had been a student of mine at Harvard. And he was the first editor, the editor of the first Annual Institute.

And he says, the first recording he said was terrible. And he said the job of putting all of that together and creating this wonderful record, an extraordinarily difficult job. But it was that kind of care, attention to what was discussed which I think produced something that's very valuable and that we don't have today.

And I would also have to say that Arthur and I spent time on that editing process. And of course, when you think back on how many hours were put into it, I suspect that's the reason you decided you didn't want to do it because you didn't want to spend that time.

ARTHUR FLEISCHER, JR: Well, It was very critical when you're on the podium for two and 1/2 days, then you have to correct your errors that have spewed forth during that period.

ROBERT H. MUNDHEIM: And that's an enormous task.

ARTHUR FLEISCHER, JR: Yeah, I didn't want to give up on that too readily. But it was a sad point of departure and an acknowledgment of the new technology.

DAVID LYNN: Yeah, and just having looked at the book from the first Institute, it's just an amazing record of what transpired and also a great resource. And I'm sure one of the great aspects of that is that because only so many people could attend live, having the book allowed that the practitioners around the country to get more access to the information and understand what had transpired.

ROBERT H. MUNDHEIM: Well, and also, I mean, again, my interests were primarily academic. And I thought this was a great place to say to students read up on that. That'll give you a really good sense of what the issues are on private placements, if that's one of the subjects you were teaching, or on transfers of control.

So I mean, I really urge you. I mean, I don't know whether the PLI still has a library of those books, or whether any of them can be accessed, because I think if they can, it's worthwhile going back and looking at that.

You said that you're in the process of trying to get that? I think that's a valuable thing to do.

DAVID LYNN: So in all, how many years did each of you co-chair the program? And then, ultimately, why did you decide to not co-chair the program anymore?

ARTHUR FLEISCHER, JR: Well, I think it was around 13 years, through 1981. In 1977, Bob had gone into the Treasury Department to solve considerably more important issues. And at that point, Marty Lipton became the co-chairperson.

And I think for that 13 years, I only missed one half day because I had pneumonia.

DAVID LYNN: Oh, my gosh.

ARTHUR FLEISCHER, JR: And it was we did a poll among the other panelists, and they told me to stay home. So I listened to their medical advice. And then Bob came back in 1981. And then he became dean. And the overpowering responsibilities of being dean, he thought it was just too much to continue.

And it also had been a lengthy period. And I knew it was time to stop because at some of the later programs I would read from the transcript of the first Annual Institute, so that was a dangerous signal.

So we decided it was time to bring on new leadership. And of course, over the last, what, 18, almost 35, 40 years, the PLI has done a masterful job in bringing in the quality and intensity and dedication of the chairpersons and panelists that they have over this whole period.

ROBERT H. MUNDHEIM: I just wanted to say one thing I always knew it was Annual Institute times because that's when I'd always have a terrible cold, a runny nose. And then I tell you, I was always grateful that at the time our children were very young, very young, so there were diapers. And at that time, you still had cloth diapers. And that's what I would bring to the table to staunch the flow.

DAVID LYNN: Did it get any easier after doing it for 13 years in terms of putting the program together? Or was it?

ROBERT H. MUNDHEIM: Well, unfortunately, diapers designed.

DAVID LYNN: In reflecting now back, do your experiences with the early Institutes suggests for us any thoughts on the program going forward?

ROBERT H. MUNDHEIM: Well, obviously, the program is very successful today. And I think attracts many more than 1,000 people that we may or may not have had at the first Institute. I'm counting here the attendees, remotely and in person.

And probably you will say that tells you there's no reason for change. But I do have two thoughts. One is whether or not it isn't worthwhile to think about having an academic as one of your co-chairs and having her participate in the planning.

And you will say, well, why would you want an academic? They don't know anything about practice. And I think that's often true, but the academic focus is a little more broadly than practitioners tend to think. And think a little bit more about what's the implication of this five years down the road. And I think that's a worthwhile focus, at least to think about bringing back to the Institute.

And then I thought, all right, well if you'd say that, well, what kind of subject would you think you'd put on the Institute that isn't on the Institute today? And I thought, how about looking ahead five or 10 years, what's going to be the impact of technology, artificial intelligence, machine learning on securities law practice and regulation? That kind of subject, which doesn't have a lot of relevance for the practice that you will go back to tomorrow morning.

But I think is important to think about longer term and would really benefit from the kind of interchange of the panelists that you are able to attract. And to get people to talk to each other about at the lunch time, at breakfast, dinner when they're together.

ARTHUR FLEISCHER, JR: I think there's one area which it's done now, but it's a point that I want to emphasize. And I mentioned earlier. And that's this focus on translating legal developments into advice to clients and changes to agreement.

And in that regard, I think a very good example of this, I had nothing to do with it, but a Fried Frank memo on the Acorn case. In the Acorn case, everyone, it just came out recently. It's 250 pages long. Fascinating reading, actually, very exciting.

But the point, it's written by the Vice Chancellor Laster. And it not only deals with material adverse changes. It deals with many aspects of corporate law. It's almost an encyclopedia.

The memo itself is available in the individual PLI online library. And I think it's an effort to do what I'm focusing on, which is namely how do you take these comments and rulings by the Vice Chancellor and incorporate them in agreements that you're working on?

And then, of course, what complicates it is the case is now on appeal. So you know, is the case going to be affirmed? And how do I incorporate it into what I'm doing?

But as I say, I think that's a tradition that has been evident in the Practicing Law Institute and in this program and will be continued with increasing emphasis.

DAVID LYNN: Great. Well, thank you so much. And I think I can speak for everyone here in attendance and all the past attendees that this Institute really makes a difference for us as practitioners and in our daily practice because we can learn so much. And we can share with each other information. And we are able to hear from experts who can offer us insights that we might not otherwise hear about.

And I think we all owe you two a great debt of gratitude for your vision and the ability to put together this program that's been such an enduring part of securities practice over the years. And also something that I think everyone is very happy to be a part of. And are very pleased to have that's our annual event to attend. So I want to thank you. And I hope we can offer them around of applause for all their efforts.

[APPLAUSE]

ARTHUR FLEISCHER, JR: And the band will be in shortly.

DAVID LYNN: And we're going to move into our next panel now. So if you can just hold on for a bit, we'll get that set up.