

# MEDIA LAW NOTES

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## Head Notes

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Many of you are undoubtedly following – at least a little – the political and legal drama surrounding the Federal Communications Commission’s proposed relaxation of broadcast ownership rules. At this writing some senators are attempting to slow or stop the F.C.C.’s scheduled December vote; if they succeed it likely will only delay what seems an inevitable change of some kind.



Through an invitation from Commissioner Jonathan Adelstein in November, I had the good fortune to testify on an expert panel at the F.C.C. media consolidation hearing in Seattle. (As a 14-year board member of Office of Communication for the United Church of Christ, Inc., I testified against the proposed relaxation of rules.) The experience was, in a word, remarkable.

Picture 1,100 people, standing room only, all there on a Friday night on one week’s notice, 99 percent against relaxation of the rules. The atmosphere was electrifying – democracy at its messiest, and most beautiful. The crowd cheered, booed, hissed, clapped,

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## Strategic Plan

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Our eyes may glaze over at the phrase “strategic planning,” but we all have a stake in the future of AEJMC and should take advantage of a current opportunity to influence the association’s direction.

At the 2008 AEJMC convention in Chicago, members will be asked to ratify a strategic plan that will guide the association for the next five years. What does the plan say? Nobody knows yet because it is still being written – and that is where AEJMC member input can make a difference.

Should AEJMC take a more visible role in public policy debates that affect journalism and mass communication? Change its name? Seek grants that would enable it to establish fellowships for scholars and teachers? Give awards for top-notch news media content and ethical behavior? Create a database of experts whose research might be of interest to news media and the public?

Or, would you be content if AEJMC simply continues to provide a place for us to meet each August and discuss issues?

All these questions and more were discussed by representatives of the various AEJMC divisions and interest groups at the midwinter business meeting in St. Louis Nov. 30-Dec. 2, 2007. Representing the Law and Policy Division, Beth Hindman and I had the opportunity to participate in the formulation of a tentative strategic plan consisting of eight points. These form the basis for a detailed strategic plan to be created by a writing team over the next few months.

The eight initial planks of the strategic plan were formulated in response to a member survey conducted at the 2007 convention as well as other elements

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# Legal Annotated Bibliography

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## Commercial Speech

**Ellen P. Goodman (2007). SYMPOSIUM: “Commercial Speech In An Age Of Emerging Technology And Corporate Scandal: Intellectual Property & Cyberlaw: Peer Promotions And False Advertising Law,” South Carolina Law Review, 58 S.C. L. Rev. 683.**

Integrated Marketing Communication (IMC) practices, especially with peer promotion efforts, and image promotion are dramatically and quickly blurring the line between commercial and non-commercial speech, making them difficult to regulate under both the Lanham Act and through the Federal Trade Commission. The author argues that peer-to-peer production and consumer brand devotions or criticisms expressed in social networking web sites are compounding the regulation of false advertising. Brand owners monitor such sites and often draw from them as branding or information promotion as part of market efficiency. Some corporations offer contests (Budweiser, e.g.) encouraging peer-to-peer mixing and mashing with the reward of having work displayed on the sponsor’s web site or in media. Goodman says distinctions are necessary for image marketing even though they make no material objective claims because: they are a form of commercial speech (signaling theory); peer comments may hold more sway than a sponsor touting itself; sponsor might mislead through fake peers. She suggests that regulators must look at whether the speech is pure per-to-peer (non-commercial speech); fake peer (commercial speech) or mixed peer (either depending on sponsor involvement .... especially hidden involvement) in determining whether the speech is subject to regulation.

**Kessler, J. (2007). “First Amendment Protection For False Commercial Speech By A Publisher Regarding The Truthfulness Of Its Publication: A Response To Litigation Arising Over James Frey’s A Million Little Pieces” Cardozo Arts & Entertainment Law Journal, 24 Cardozo Arts & Ent LJ 1219.**

Examining state court consumer actions against Frey’s publisher alleging that the promotion of Frey’s book constituted deceptive acts in the conduct of commerce, the author contends such suits are in serious con-

flict with the First Amendment. Kessler says such conflict results because the negligence standard does not meet the heightened standard of knowledge and intent necessary in First Amendment cases. Furthermore, the commercial speech doctrine does not apply in such cases because a classification of non-fiction does not propose a commercial transaction, but simply reflects the publishers cataloguing (and likely belief in the author’s description). Kessler concludes that regardless of whether such classifications are in a completely commercial setting, the actual malice standard should be applied based on the “commonsense differences” the Court referred to in Virginia State Board of Pharmacy.

## Defamation

**Barron, B. (2007). “A Proposal To Rescue New York Times V. Sullivan By Promoting A Responsible Press,” American University Law Review, 57 Am. U.L. Rev. 73.**

The author opines that the actual malice standard established in Sullivan should be reworked to balance three competing interests: the under protection of the press (through high litigation costs); the overprotection of the press (allowing for media negligence - a perverse incentive to be irresponsible), and under protection of plaintiffs’ reputations based on a flawed premise that public people compromise their reputational interests and can amply mitigate the harm. Barron supports his premise of a constitutional interest in a responsible press through the Marketplace of Ideas concept important to self governance and opinions such as Brandeis’s view in *Whitney v. California* that promoting the unfettered interchange of ideas brings about political and social in a democracy.

He proposes a seven-part reasonable practices analysis for summary proceedings that examine: reporting procedures (length of time spent on fact checking; time sensitivity; foreseeable harm to reputation and review); opportunities offered for counter speech (during and subsequent to publication); and whether there is evidence of knowledge regarding falsity.

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## Electronic Communication

**Byrd, P. R. (2007) COMMENT: "It's All Fun And Games Until Someone Gets Hurt: The Effectiveness Of Proposed Video-Game Legislation On Reducing Violence In Children,"** *Houston Law Review*, 44 *Hous. L. Rev.* 401.

The author contends that the Violent Video Game Act proposed in 2003 and similar proposals fail at the outset because they do no more than Entertainment Software Rating Board (ESRB) and do little to address a problem that may or may not exist. Reaction to the 2005 "Hot Coffee" download modification of Grand Theft Auto: San Andreas which allows players to participate in crude sex acts with a female character, he claims, has spurred new efforts to regulate violence in video games. The reactions are what Byrd calls Moral Panic fed by Deviancy Amplification through media, fed by anecdotal evidence, making deviant behavior seem more common than it is. He analyzes conflicting social science reports about the effects of violent media and questions why youth violence has decreased as video games become more sophisticated. Proposed regulations do not address why the system used by ESRB are not working as parents choose games played by children 70 percent of the time, purchase such games for their children 82 percent of the time, and 73 percent of the time children are able to purchase the game themselves. Byrd suggests in order to meet any legislative goal of prohibiting children from playing such games, retail and parental apathy must be addressed. Liability-only legislation, he says, leads to gross overspending, and does nothing to educate about game content.

## Intellectual Property

**Kohler, D. (2007). "This Town Ain't Big Enough For The Both Of Us--Or Is It? Reflections On Copyright, The First Amendment And Google's Use Of Others' Content"** *Duke Law & Technology Review*, *Duke L. & Tech. Rev.* 5.

With the caveat that the analysis is not a comprehensive solution to complex issues of copyright, the author focuses his discussion of the intersection of copyright and the First Amendment around *Perfect 10 v. Google Image Search* and *Author's Guild v. Google* to demonstrate how the First Amendment might be used to facilitate access to information while protecting copyright. In *Perfect 10*, the Ninth Circuit held Google's use of thumbnail images of nudes was not an infringement because it was a transformative use and served a public benefit as outlined in *Kelly v. Arriba Soft Corp.* The Authors Guild case is a result of the Google Book Project encompassing scanning about 3 million books into

Google's data base (without permission, except for the Partners Project and public domain). Kohler suggests the public benefit of such a project should be given great weight in the Fair Use Analysis for this case. Doing so, he argues, could inform other cases on properly balancing public access with copyright.

## Pornography/Obscenity/Indecency

**Calvert, C. (2007). "Imus, Indecency, Violence & Vulgarity: Why the FCC Must Not Expand Its Authority Over Content",** *Hastings Communications and Entertainment Law Journal* 30 *Hastings Comm. & Ent. L.J.* 1

The author argues, based on social, economic and legal reasons, that attempts to include racist/sexist language and violence within the scope of FCC regulatory power are efforts promoting government intrusion on expression. Within the context of the recent Congressional move to increase fines, the increase in notices issued by the FCC, the April 2007 FCC report on television violence, and the already vague definitions of what counts as "indecent" or "violent," Calvert admonishes that proposed regulations would be overbroad, vague and constitute viewpoint discrimination (good speech based on race/sex vs. bad speech based on race/sex). Parents underuse monitoring devices such as the V-chip and ignore ratings. Then they call on the government to monitor programming essentially turning the FCC into a "nanny" and inviting government act to as a censor in a culture war. While corporate censorship can be either good or bad, "Let the twin forces of counter speech and marketplace economics dictate the outcome of these situations, not the federal government," he says.

**Danoff, A. (2007). COMMENT: " 'Raised Eyebrows' Over Satellite Radio: Has Pacifica Met its Match?,"** *Pepperdine Law Review*, 34 *Pepp. L. Rev.* 743.

With exponential growth over the past two years, satellite radio has become nearly as pervasive as in many homes and vehicles as radio was in Pacifica, thus, warranting another look by the FCC into its obligations in the public interest, convenience and necessity. The author claims that while the Court is unlikely to extend Pacifica, it would likely uphold "raised eyebrow" authority as a less restrictive way to protect children from indecent programming while assuring adults maintain First Amendment privileges. Citing that only about 10 percent of parents use V-chips and cable offers blocking capacity, Sirius currently only provides an opt-in (no fee) for its Playboy radio. She suggests that even though satellites are extraterrestrial, their capabilities are earthbound and subject to an FCC that presently chooses

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# Shield laws face challenges, hostility

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The long, hard slog toward a federal reporter's shield law appears to have slowed to a crawl. The good news is that the House of Representatives voted 398-21 to pass the Free Flow of Information Act of 2007 (H.R. 2102) on Oct. 16, and that a similar bill passed out of the Senate Judiciary Committee in early October. The bad news is that Sen Jon Kyl (R-Ariz.) continues to seek to add a laundry list of additional exemptions to the already qualified privilege that the bill would provide. Although Sen. Patrick Leahy (D-Vt.), who chairs the committee, issued a statement on Dec. 3 calling for the Senate to "proceed to enact this legislation into law," most Congressional watchers think it unlikely that any deal can be reached to move the bill to the floor before the Senate recesses on or about Dec. 21.

Whenever Senate staff returns to negotiations, one of the sticking points will be how to define a journalist. Even senators who have been sympathetic to the idea of federal reporter's privilege, including Sen. John Cornyn (R-Texas) and Sen Dianne Feinstein (D-Calif.), are concerned about this. Absent a miracle, the soonest a compromise bill could be expected to go to a vote is late February or early March.

Reasonable people can agree to disagree about the wisdom of pursuing any federal shield law at all, much less the narrow, compromise version full of exceptions and qualifiers that is likely to emerge from the necessary behind-the-scenes dickering. Nevertheless, it is remarkable that a huge coalition of media organizations has come closer to realizing their goal of getting some shield law through Congress than has ever been the case since the Supreme Court's ruling in *Branzburg v. Hayes* in 1972.

A skirmish in Washington state right after Thanksgiving reminds us that, despite the fact that most states have some statutory shield law, and courts in almost every state have recognized some kind of journalist's privilege, there's still a lot of hostility toward the idea that there should be any kind of testimonial protection for reporters. Seattle City Attorney Tom Carr subpoenaed three *Seattle Times* reporters to compel them to reveal the identity of confidential sources who had been quoted in the newspaper as part of his defense of the city in a civil suit filed by a former police officer. Ironically, Carr chairs Gov. Chris Gregoire's "Sunshine Commit-

tee," which was created in the same legislative package that included the state's new shield law and was signed into law in April. Carr was quoted in the Seattle *Post-Intelligencer* as saying that his subpoenas weren't intended to challenge the shield law or "to intrude into the important process of investigative reporting," but were "for litigation purposes only" – a distinction that is lost on me.

Another bizarre encounter with a shield law has been brewing in New Jersey since February 2007. A Teaneck city councilman named Michael Gallucci, using the pseudonym "Anti-Brennan," criticized a local firefighter named William J. Brennan, whom he characterized as a "litigation terrorist," on a community message board managed by NJ.com, an ISP and the combined web site of the Newark *Star-Ledger* and several other Newhouse newspapers. Brennan subpoenaed New Jersey On-Line, which publishes NJ.com, in connection with one of his many employment-related lawsuits against the city, seeking the identity of "Anti-Brennan" in order to sue him for libel. The ISP released Gallucci's identity without notifying him first, which subsequently led to his forced resignation from the township council.

Gallucci in turn sued New Jersey On-Line, claiming that state law requires that anonymous Internet users be given notice and an opportunity to challenge subpoenas before their identities are released, citing *Dendrite International v. Doe*, 342 N.J. Super. 132 (App. Div. 2001). He also argued that New Jersey On-Line was obligated to protect his identity under its Privacy Policy and User Agreement, that it had violated his privacy by publishing the "private facts" of his identity and that he had posted comments on the message board, and that he had suffered emotional distress.

So far, nothing very novel there. But one of Gallucci's lawyers, Jennifer Soble of Public Citizen, also contends that Gallucci's relationship with NJ.com was analogous to that of a newspaper's confidential source. In a press release, she said, "When a newspaper is asked or even subpoenaed to identify a source of one of its news stories, any paper worth its salt would fight the subpoena before revealing that information. When a newspaper invites citizens to comment on its Web site, it

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# AEJMC ethics demand public service

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One task of the PF&R Chair of our Division is to remind us all about our responsibilities under the AEJMC Code of Ethics. In case you've not done so lately, please take a moment to review the Code's PF&R Guidelines at [http://www.aejmc.org/\\_org/codeofethics/pfandr.php](http://www.aejmc.org/_org/codeofethics/pfandr.php). In this column, I'd like to focus on the fifth guideline: "Public service contributions should be expected of all AEJMC members." The guideline states:

AEJMC members have a mandate to serve society beyond their teaching and research. AEJMC members should offer services related to their appropriate professional fields, particularly activities that enhance understanding among media educators, professionals and the general public. AEJMC members should assist the organization, other media organizations, and media practitioners.

Most of us are required by our institutions to engage in service activities in varying degrees. Sometimes, we view service activities as necessary to our professional success but, perhaps, a distraction from our research and teaching agendas. However, in reflecting on our ethical charge to "serve society" and "offer services to [our] appropriate professional fields," we all can – and often do – seek out service opportunities that meet these goals and also enhance and inform our research and teaching.

For instance, recently, I was appointed to a two-year term as a public member of the National Advertising Review Board (NARB), the body that handles appeals of decisions of the National Advertising Divi-

sion (NAD) in the advertising industry's process of voluntary self-regulation administered by the National Advertising Review Council (NARC). Recently, I had the opportunity to chair a panel and help decide a national advertiser's appeal of NAD findings that claims in the advertiser's toothpaste advertising were either misleading or unsubstantiated. We reviewed the entire case record – which included consumer perception surveys and scientific studies of product efficacy – and heard arguments by the attorneys for the advertiser and the competitor that instigated the case. It was gratifying to contribute to an effective self-regulatory process focused on fair competition and consumer protection. And, I found that public members are especially appreciated in the advertising self-regulatory process as neutral parties with no industry affiliations.

NARB service has had other benefits. In addition to providing first hand examples for my media law students, NARB service keeps me connected with the advertising industry and legal profession. In addition, NARC graciously provided my school with educational access to its proprietary database of reported cases – a rich resource for teaching and research materials. NARB service has allowed me to serve professionally in my field and, hopefully, help fulfill the Code's PF&R goal to "enhance understanding among media educators, professionals and the general public."

All of you, of course, actively engage in outstanding professional service activities and have done so for years. Let's all take a few moments to reflect on the public service prong of the AEJMC Code's PF&R Guidelines and commit to energizing our public service agendas. Also, let's commit to seek out new outlets for public service and more broadly share our collective talents, dedication and expertise.

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owes those citizens the same protections against unreasonable intrusions into their privacy." New Jersey, of course, has one of the strongest shield laws in the country.

Gallucci's argument is reminiscent of the one made by the plaintiff in *Cohen v. Cowles Media Co.*, the 1991 Supreme Court case that held that the First Amendment was no bar to an "outed" source suing a

news organization on a promissory estoppel theory. Cohen cited the Minnesota state shield law as evidence that the legislature intended to create a legal right for the source to enforce a promise of confidentiality.

We generally think of a shield law as just that – a shield to protect reporters. But the Gallucci case – which, mercifully, was withdrawn, without fanfare or explanation in mid-November – reminds us that it can also be a sword to be wielded by unhappy sources.

# 2008 Southeastern Colloquium

Since 1976, the AEJMC Southeast Colloquium has provided a place for graduate students and faculty in law and other divisions to gather and present research.

The 2008 colloquium is scheduled for March 13-15, hosted by the Auburn University Department of Communication and Journalism. Papers will be accepted in divisions for Law, History, Magazine, Newspaper, and Radio-Television Journalism, along with an Open Division.

The conference will be hosted at the Auburn University Hotel and Conference Center, located across the street from the Auburn campus and the Research 1-level library – for those of you who can't seem to get away from your work.

In early December, the university announced a major renovation of the hotel's guest rooms, so colloquium attendees will not be able to stay at the hotel.

However, the host committee has been working with the conference center's sales staff to assure alternative lodging arrangements, acknowledging the need to provide affordable options. These options will be presented after the first of the year, when registration information will be available through the AEJMC Web site and the Auburn Web site.

Another highlight for this year's colloquium is that the Auburn Journalism Program has scheduled this year's Neal and Henrietta Davis Lecture Series to coincide with the event.

The series commemorates the legacy of the Davis family, who published the *Lee County Bulletin* (later the *Auburn Bulletin*) and courageously supported civil rights during the 1950s and 1960s.

This year's speaker will be Clarke Stallworth, a respected Southern newspaper editor who was an editor for both the *Birmingham News* and *Birmingham Post-Herald* during the civil rights movement.

Stallworth will speak on Friday night at 5 p.m. in the conference center, providing the colloquium's keynote address. Participants are invited to join members of the Auburn community for this treasured annual event.

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## Head Notes....

stood, shouted. Speakers included politicians and broadcasters on both sides of the issue, ordinary folk who care about broadcasting, community activists, grandparents, children, you name it. There were protesters dressed like zombies, a 12-foot dancing skeleton puppet (I don't get it, either, but it was kind of cool), and an hours-long wait for members of the public to speak.

The crowd treated Commissioners Adelstein and Michael Copps like rock stars, and they responded. Chairman Kevin Martin, reading the crowd well, initially declined to speak, until some in the crowd shouted, "Explain yourself." He tried to, until others shouted, "Shut up and sit down." I admired his calm in the midst of the booing and hissing. The crowd cheered as our governor (a Democrat) and attorney general (a Republican) spoke – and when was the last time you saw a standing ovation for an attorney general?

My testimony focused on the commissioners' status as stewards for the American public, and it was well received (the crowd was, after all, very one sided). There has been some fallout, though: the Washington state broadcasters aren't very happy with me. They sent a letter to my department chair asking how we in the department approach controversial issues in class and noted their long-term support of us (both financially and in their generous professional support of our students). While that hasn't been particularly pleasant, I guess it means we had an impact.

The best part, though, was realizing how many people cared – really cared – about something you and I love, media law and policy. They were there because they care about broadcasting, and media ownership, and democracy, and they wanted to be heard. Heard they were: the hearing began at 4 p.m. and went until well after midnight (3 a.m. for the Eastern-Time-based commissioners).

Not often do citizens get worked up about media policy. When they do it's a wonderful sight. I don't know how this whole issue will resolve, nor will I comment on the overall process the F.C.C has taken on it. But for that one moment in Seattle, democracy and media policy were front and center.

## Teaching Resources

Numerous resources for teaching FOI in a media law course, reporting course, or on its own are available on the section Web site at:  
[www.aejmc.net/law/teaching-links.html](http://www.aejmc.net/law/teaching-links.html).

Included in these links are information on records requests, organized FOI audits, links to FOI blogs and news sites, and examples of successful and engaging teaching assignments.

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not to regulate. She suggests that a self regulation regime, less restrictive alternatives to traditional broadcast regulation, parental education/discretion, and a child-friendly tier (15 channels or so) available to subscribers would be adequate alternatives to simply threatening fines .

## Privilege

**Sean W. Kelly (2007). Note: “Black And White And Read All Over: Press Protection After Branzburg” Duke Law Journal, 57 Duke L.J. 199.**

Using unpublished private notes of Supreme Court justices and draft opinions, the author suggests that a close reading of Branzburg suggests it marks a shift from Black’s press perspective to White’s less favorable view of press protections, although the Court still held some accommodation must exist. Kelly contends the

Justice’s case files also indicate reporter’s information and sources can be required if they are “necessary to justice.” He says Powell was reticent to constitutionalize privilege when he filed his concurrence; Stewart was tentative, but warned about the dangers of using journalists as an investigative arm of government, and Douglas focused “as much on privacy of association” in his dissent as on press freedom. Based on the deliberative notes and drafts, the author concludes that the Court relied heavily on an assumption of judicial and prosecutorial discretion rather than constitutional privilege or a federal law. Such discretion is deteriorating as prosecutors and judges overstep Branzburg’s spirit (per Posner’s dicta), and pursue federal venues to circumvent state shields. While, While a D.C. Circuit judge found case and common law to suggest such discretion, Kelly suggests the Supreme Court could mandate discretion and perhaps recognized at least a qualified journalist privilege.

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## Strategic Plan...

of an “environmental scan” conducted by AEJMC leaders and an Atlanta-based consulting organization. I list the eight points here in order of priority, as determined at the midwinter meeting:

**Create brand promise** – AEJMC should establish its “brand” as a leader in communication research and teaching and seek to be better known for the values already embodied in the organization’s mission and core values, such as fostering diversity and free expression. A name change is possible.

**Build academy and industry reputation** – AEJMC needs to become more nimble to respond to public policy developments and have a higher profile in journalism and mass communication practice as well as education.

**Develop financial strategies** – AEJMC should hire a grant writer or fundraiser to seek funding that would enable the association to provide greater service to members and society at large.

**Redefine internal structure** – AEJMC should explore whether the current structure of divisions and interest groups could be streamlined or organized better. Unity within the organization, and coordination with regional organizations, should improve.

**Develop membership program** – AEJMC should more aggressively recruit students and retain

members. Current members could benefit from additional services such as mentoring, international outreach and workshops not connected to the annual conference.

**Expand expertise** – AEJMC should make its members’ research more prominent and accessible, perhaps through a permanent searchable database. An expert hotline could be created.

**Create innovative scholarship center** – AEJMC should explore the creation of a think tank or other incubator for new and important research.

**Engage globally and multiculturally** – AEJMC would benefit from partnerships with international organizations of communication scholars, and the organization should take a bigger leadership role in diversity issues domestically.

It might seem like some of these ideas are vague or pie-in-the-sky, and that is because they are. But this represents only one step in a process that, to be successful, needs the input of interested AEJMC members. While the writing team already has begun its work, Beth and I will be happy to receive your feedback and pass along your comments to the team.

AEJMC exists to serve the needs of us, the members, and we must get involved and express our views if we want the organization to serve us better. Feel free to email me at [ed\\_carter@byu.edu](mailto:ed_carter@byu.edu) or call (801) 422-4340 if you have comments or suggestions. I hope we can give this some thought so the strategic plan will become more than just a piece of paper we vote on in August 2008 and then forget about.

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