

Five tips on handling the adverse Traffic Collision Report in bicycle and pedestrian cases

The officer and the witness say in the TCR that your guy was at fault – but that doesn't make it so

By Greg Schaffer

The first hurdle in handling a bicycle case is overcoming what I call "bike bias." As a cyclist, I have seen firsthand drivers who fail to share the road with cyclists. I can't tell you how many times cars have aggressively sped around me, peeved that I'm seemingly slowing them down as I bike along Page Street on my way to work. Drivers do not like it when riders split lanes through traffic in the Financial District. Drivers think it is reckless when riders pass on the left of a long line of cars waiting for a traffic light. In urban areas, drivers perceive the cyclist to be "winning," while the driver is stuck in the car behind traffic. The attitude of these drivers may not be reasonable, but to combat the bias you must understand it exists and attempt to change the narrative early.

The unfortunate bias against cyclists translates into bad witness statements, sloppy collision analysis by investigating officers and incorrect findings of fault, all of which make their way into the Traffic Collision Report (TCR). If your practice involves bicycle cases, you have seen your fair share of unfavorable TCRs. Similarly, deference is often given to a driver in many pedestrian collision reports. At the outset, you know you will be dealing with an investigating officer or witness who will favor the defendant driver. With an adverse police report or witness statement, the chances of pre-litigation settlement drop significantly. You can set yourself up for success, however, if you properly investigate the collision and gather evidence as soon as the case comes to you.

The second hurdle in handling a bike or pedestrian case is to understand the unique vehicle dynamics of a two-wheeled vehicle or pedestrian collision. Bikes are not cars, so the standard accident reconstruction we are used to does not translate in a bike case. You must arm yourself with knowledge about relative bike speeds, hazard perception, gearing, and the forces at work when a cyclist or pedestrian is hit by a vehicle. With this knowledge, you can obtain beneficial evidence from the scene and statements from witnesses when investigating your case.

1. Use common sense

We have all seen cyclists behaving badly – not fully stopping for stop signs, running red lights and not yielding the right-of-way. I have even paid my own ticket for rolling through a four-way stop on my bike.

While cyclists (and pedestrians) may violate the vehicle code, they usually do not purposefully place themself in danger. If you watch cyclists on Market Street in San Francisco during the morning commute, you will notice they are attentive to what is going on around them. They are not on their phones, fiddling with a radio, or drinking coffee like many drivers. Cyclists actively scan the road, looking for dangers like train tracks, opening car doors, or a merging vehicle. Active scanning is even more present to a cyclist or pedestrian who is bending the rules.

If you watch cyclists rolling through a four-way stop, you see them looking at the cars in the intersection to make sure they are staying put. Similarly, if you watch a pedestrian jaywalking in the Financial District, you'll see them looking toward oncoming traffic. Cyclists and pedestrians know that challenging a car is a sure loss for them. Keep this in mind when you put yourself in the shoes of your client.

This approach was useful in a wrongful death case I handled in which a propane truck hit the decedent pedestrian near Rainbow Grocery at 13th and Folsom in San Francisco. The investigating officer determined that the northbound pedestrian was jaywalking across 13th Street because his body was found 20 feet outside of the crosswalk. The propane truck had turned right from northbound Folsom onto 13th, a busy roadway with three eastbound lanes.

We retained an accident reconstruction expert to evaluate the evidence and opine that the impact threw the pedestrian's body out of the crosswalk. But, the overwhelming commonsense argument in my view was that no reasonable person would jaywalk across six lanes of traffic (there are also three westbound lanes on 13th) when there's a perfectly good crosswalk 30 feet away, and if he had jaywalked he was not looking at the ground. If jaywalking, he would have looked westbound to make sure the coast was clear, and he would not have missed a propane truck

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coming at him. A common sense evaluation was that my pedestrian was crossing northbound, in the crosswalk, looking north. When the propane truck came up from behind him, he did not see the truck because he had a walk sign and was not expecting danger.

The moral: if you have a TCR with a police officer or witness who says your cyclist or pedestrian was riding or walking in a dangerous manner, do not take it at face value. Be critical, do the digging, change the story.

2. Use Google maps to investigate your case

If you are not already using Google maps to initially evaluate your cases, you should start. I use Google maps for *every* collision case. It is not a substitution for going to the scene to observe, but it is an extremely invaluable tool. When I take a client intake over the phone, I have Google maps open so I can visualize the scene. I take screen shots to put in my demand letters. I check parking signs to see if cars were likely parked in the area at the time of collision. I use aerial photos to determine car lengths. I have used the distance function to show an adjuster that a defendant did not have her turn signal on for long enough.

In several dangerous condition cases, Google maps have been pivotal. One case involved a large pothole caused by a sloppy asphalt patch after a utility dig on Broadway Street in San Francisco. My cyclist hit the pothole, was ejected from his bike and injured both wrists. By the time the client came in, the pothole was fixed and the City claimed they did not have prior notice of it. The City had recently paved the road, and in discovery responses pointed to a "guarantee inspection" two months prior to the accident date where the City had signed off on the paving project. Using the street view function, I checked the past Google photos of the roadway, and the photos clearly showed the pothole in a Google image taken one month before the "guarantee inspection." Google map images show the date and year the photos are taken, which I highlighted in the demand package to the City. I did not end up taking the inspector's deposition, but it would have been fun to ask him how he missed a massive pothole in the newly paved road during his "guarantee inspection."

In another case, my client's bicycle tire went into a dangerous sewer grate and I used the prior street view photos to show that someone had crudely spray painted an arrow by the sewer grate, presumably to warn cyclists of the danger. Google maps showed that the arrow had been present for at least six months prior to the accident. It was hard for the City to dispute notice and that the grate was dangerous when their employee had painted a warning arrow on the ground.

For many roads, these historical photos go back 10 years. You can use them to demonstrate how long the dangerous condition has been present and cross-reference those dates with maintenance or inspection records obtained in discovery.

3. Quickly go to the scene and observe

You must spend time at the scene watching cyclists (or pedestrians) interact with traffic, the roadway, and traffic signals. Watch how cyclists, pedestrians and vehicles interact with one another. Does the scene fit with what your client is telling you, or is it closer to what the investigating officer determined or what the witness stated?

In one case, my client was riding south in a dedicated bike lane along the Embarcadero during rush hour. The bike lane is adjacent to the curb, and he was passing the slow rush hour traffic on his left. Near the large crosswalks by Justin Herman Plaza, a front passenger door opened and took him out. While he was going to the emergency room in an ambulance, the driver of the vehicle and the exiting passenger told the investigating officer they had pulled over to the curb to let the passenger out when the cyclist tried to "squeeze" by the car to pass on the right. The investigating officer adopted this statement in his conclusion, and determined the cyclist was at fault. As a rider, this seemed like an odd cycling decision. I went to the scene with my client during rush hour, and spent 45 minutes observing and discussing what happened.

While there, I noticed a smooth and relatively quick pace in the unobstructed bicycle lane. Vehicle traffic was heavy. Many cars stopped to let out passengers who were going to the ferry building. Because traffic was slow, the cars were stopping in their lane and the passengers exited quickly, opening their door into the bike lane, so the car could proceed on its way down the Embarcadero without pulling out of traffic. Is it more plausible that my client, a regular commuter cyclist, saw a car pull over to the curb in front of him and tried to squeeze by it on the right, or that the driver and passenger were lying about pulling over? Of course the driver was lying, but I may not have known that if I had not taken the time to go observe the scene.

4. Talk to witnesses before the insurance company does

If you have a witness in a TCR saying your cyclist did something wrong, call them. Ask them what they observed, and how they observed it. The conversation should be cordial: "I represent a cyclist who was injured in a collision you witnessed and I'd appreciate your help so I can understand what happened." But treat these conversations like a nice deposition. It can also be helpful to meet with a witness at the collision scene so you can get their precise vantage point.

In the case with the cyclist on the Embarcadero, the TCR contained a statement from a witness who reportedly saw the car pull to the curb with its flashers on, saw the bicyclist going 25 mph, and saw the cyclist trying to "squeeze" between the car and curb. I called him, and the first thing he told me was that my guy was "flying," going so fast that he was worried he might have killed himself. In discussing his observations, it became apparent that the speed he attributed to my

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cyclist was a product of the suddenness of his recollection of the impact. After speaking with him, he agreed that my cyclist was going the same pace as the rest of the cyclists and was probably not going faster than the 25 mph speed limit. If the insurance company had talked to this witness first, I would have heard about how my client was "flying" down the Embarcadero for the duration of the case.

While you have a witness's cooperation, get something tangible. In that same case, the witness told me he catches the ferry home every day, so I asked him if he'd be willing to meet me at the subject crosswalk so I could understand the event better. We watched as several taxis let passengers out near the crosswalk, without pulling over to the curb. The witness agreed to allow me to take pictures of him standing in the roadway where the potential defendant's car had been. He wasn't standing next to the curb. I included those pictures in the demand letter, and the case settled pre-litigation despite a bad police report that contained an unfavorable statement from that witness.

In another case, I had a Good Samaritan who had chased down a car that left the scene after the driver hit my cyclist. There was no TCR so there were no written statements of the event. I talked to the witness twice on the phone early on and she was extremely helpful and cooperative. Thinking that she wasn't the type to disappear, I sent out my pre-litigation demand with her phone number for the adjuster. The insurance adjuster could not get a hold of her, and she stopped returning my calls. When the insurance company did not put pre-litigation money on the case, I filed the lawsuit wishing I had taken the time to get a declaration from her. Lesson learned: when you have someone willing to help, take them up on it and get something in writing. They may get busy with other things and change their mind about wanting to participate in your case.

5. He who waits, loses

We are all busy. Much of our attention is focused on cases in litigation or those with approaching deadlines. Rather than jumping on a new case quickly, you may find yourself scrambling around six months before a lawsuit must be filed to work on settlement.

If you wait, you lose important information and positioning. Most significantly, you lose witnesses' interest. Even witnesses who believe your client is at fault are commonly sympathetic to your client's injuries and want to help. Talking to witnesses early establishes the relationship, and makes you credible. A year and a half later, they wonder why they are being bothered so late in the game and they may question your motivations.

In the face of a bad traffic collision report, gathering evidence and witness testimony early will vastly improve your chances of settling your case early. The ripple effect of this practice is that you will have fewer cases in litigation, fewer cases approaching statutory deadlines, and fewer fires to put out.


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