

Discovery in a dangerous condition case

By Mary Alexander

Proving government entity liability in a dangerous condition of public property case requires discovery to uncover the history of the roadway or property, failure to maintain or repair, changed conditions, and other facts that negate immunity. Here we look at sources, approaches, and strategies to win. And remember the statute of limitations: a claim must be made against a public entity within 6 months of the incident!

Picture a T-intersection where parked cars block the view of the driver making a left turn. (See Image 1.) The parked vehicles near the corner obscured the line of sight and caused a driver to pull out onto the roadway hitting a motorcyclist, resulting in the loss of his leg. Prior to the

incident, many neighbors had complained to the city about the dangerous intersection and speeding on the road. Documents showed increased accidents over time at the intersection. Other intersections in the city had extended no parking zones at the corners of intersections for better line of sight. After the case settled, the city prohibited cars from parking near the intersection by creating a “no parking” red zone at the intersection by installing a flexible delineator, parking blocks on the road and improved striping of the crosswalk. (See Image 2.)

It is an example of how we can make our roads safer through holding public entities accountable.

Immunity for a Discretionary Act

If a public entity employee vested with appropriate discretionary authority exercised discretion, e.g., a traffic engineer signing plans and drawings for the roadway, design immunity will apply. However, there are exceptions to the immunity if, for example, the “wrong person” approved the plan, there are changed conditions or a failure to maintain the road as designed or to repair it.

Discretionary Approval of the Design

The design must be approved before construction by either the legislative body or some employee vested with the discretionary authority to approve the design, or the design conformed with previously approved standards. So, remember, just

because an engineer signed the plans doesn’t mean it was the right engineer! But also, don’t assume that the design doesn’t have immunity simply because you don’t see an engineer’s seal and signature.

Changed Physical Conditions

Changed physical conditions can take many forms. Most often it is established by showing a combination of substantially increased traffic, speed or change of use and abnormal traffic collision patterns, and changes in signage, striping or other conditions.

Failure to Maintain or Repair

If the public entity failed to maintain the roadway, had notice of the deteriorated conditions and failed to repair or warn, then there is no immunity. For example, if there was disrepair of the striping, signage, pavement, line of sight, etc.

PRE-LITIGATION DISCOVERY

TIMS

One way to find out if there have been changed circumstances of increased injury accidents is “TIMS” or Transportation Injury Mapping System out of the University of California, Berkeley (tims.berkeley.edu). This database has a number of powerful tools that can assist you in assessing whether a dangerous condition might exist. The SWITRS GIS (Geographic Information Systems) map provides an interactive map that allows you to search by county and collision characteristics,



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<https://maryalexanderlaw.com/>

IMAGE 1



IMAGE 2



run comparisons with adjacent intersections, view collision diagrams and basic SWITRS information. The SRTS (Safe Routes To School) map allows you to view pedestrian and bicycle collision maps within a half-mile radius of public schools in California. Another helpful tool is the ATP Maps & Summary Data that utilizes multiple databases to generate pedestrian and bicycle collision hot spots and generate data summaries within specified projects and/or community limits. Gone are the days of sending out a SWITRS request and waiting a week or more to get results before you can evaluate a claim!

City or County GIS Databases

Some cities and counties create their own GIS Databases, often as a joint effort between their department of public health and public works to assist in obtaining various forms of funding for infrastructure improvements. For example, the City and County of San Francisco uses a system called TransBASE which shows accidents in geographic boundaries, including visual overlays similar to TIMS – but often with greater detail. (See Images 3 and 4 – city/county GIS database.)

SWITRS

The Statewide Integrated Traffic Records System (SWITRS) uses traffic collision reports that are searchable by location, the type of collision (auto, pedestrian, bicycle), number of injuries or deaths for each collision, and other specific information. It is a crucial source for determining

IMAGE 3

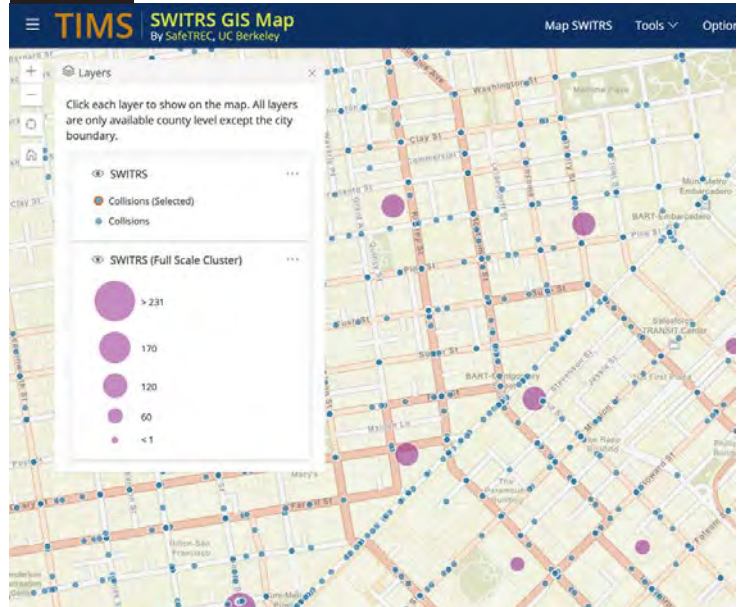
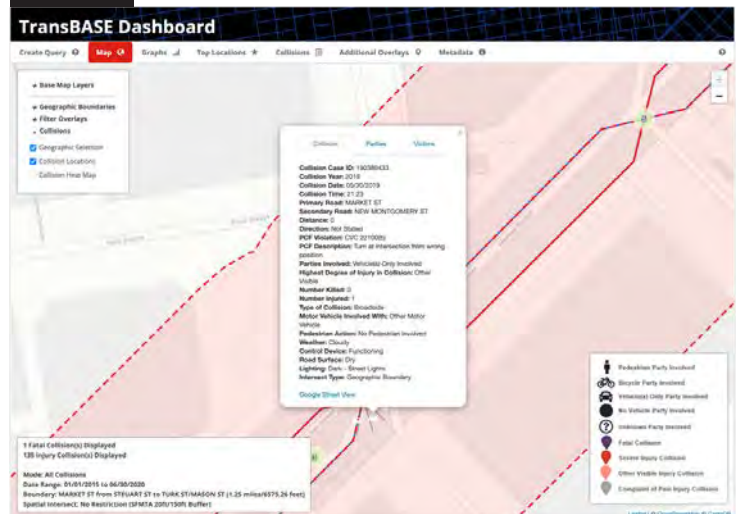


IMAGE 4



not only the number of collisions, but also whether they are similar to your case. (See Image 5 – example of SWITRS.)

Look for Multi-Jurisdictions

It is important to look for all the public entities that may be involved in the intersection or roadway. There may be more than one entity involved and there may be cross-over coverage. Additionally, when larger cities and CalTrans work together, they sometimes get sloppy with which entity is vested with authority to approve design elements. CalTrans controls state routes (Streets and Highway Code 660). Cities and counties control their roads (Vehicle Code 778) and the California Public Utilities Commission (CPUC) controls rail crossings. If the wrong entity approved your project, there is no design immunity! (See Image 6 – multi-jurisdiction satellite view.)

Look for Changed Physical Conditions

To overcome the statutory design immunity, look for changed conditions. A public entity loses design immunity for a dangerous condition if the following applies: (1) if the plans or designs had become dangerous because of a change in physical conditions; (2) that the public entity had notice of the change in physical conditions; and (3) that the entity had reasonable time to obtain the funds and carry out the work to correct the defect OR if it did not have the money, it did not make a reasonable attempt to provide adequate warnings of the dangerous condition.

Changed conditions can take the form of more traffic (look at AADT traffic counts done over time), changes in LoS (Level of Service), more collisions (as seen on SWITRS and other websites), and/ or deteriorated conditions of the roadway.

For example, when the road was approved and built, was it in a rural setting and now there is a massive housing development that feeds traffic into the road? If it is a formerly rural highway, has it now exceeded its design capacity? (See Image 7 – before and after view of roadway.)

When it was built, the intersection didn't need a stop light, but now the traffic counts and collisions show it needs one and it meets the warrants for a stop light. Or the lines of the crosswalk are so worn, that

IMAGE 5

Report run on: 2/1/2016		#160143 2005 - AV. 2015 AV. 2016 COLLISIONS ON STATE ROUTE 101 NB & GREAT AMERICA PKWY, SANTA CLARA COUNTY		Case Listing Page 1
Primary Rpt RT 101	Distance (ft) 500	Direction S	Secondary Rpt GREAT AMERICA PI	NCIC 9340
City SANTA CLARA	Population 6	Rpt Dist	Beat 120	Type 1
Primary Collision Factor IMPROP TURN	Violation 22107	Collision Type	HIT OBJECT	Severity PGO
Weather 1 CLOUDY	Weather2 RAINING	Road Surface WET	Lighting DARK - ST LTS	Post Action
Motor Veh Involved With	FIXED OBJ			
PARTY INFO		VICTIM INFO		
Party Type Age Sex Race Sobriety1 Sobriety2	Motor Veh Coll Dir SW Veh CHP Veh Make Year Sp Info OAF1 Viol OAF2 Safety Equip	Role	Ext of Inj	Age Sex Seat Pos Safety Equip Ejected
1F DRVR 17 F W HNRD	RAN OFF RD S A 0100 HONDA 1996 - 3 N - L G			
Primary Rpt RT 101	Distance (ft) 700	Direction S	Secondary Rpt GREAT AMERICA PI	NCIC 9340
City SAN JOSE	Population 7	Rpt Dist	Beat 120	Type 1
Primary Collision Factor UNSAFE SPEED	Violation 22350	Collision Type	REAR END	Severity PGO
Weather 1 CLOUDY	Weather2 RAINING	Road Surface WET	Lighting DAYLIGHT	Post Action
Motor Veh Involved With	MV ON OTHER RD			
PARTY INFO		VICTIM INFO		
Party Type Age Sex Race Sobriety1 Sobriety2	Motor Veh Coll Dir SW Veh CHP Veh Make Year Sp Info OAF1 Viol OAF2 Safety Equip	Role	Ext of Inj	Age Sex Seat Pos Safety Equip Ejected
1F DRVR 34 F A HNRD	PROC ST N A 0100 TOYOT 1998 - 3 N - M G	PASS	3 M 4	M Q 0
Primary Rpt RT 101	Distance (ft) 1400	Direction N	Secondary Rpt GREAT AMERICA PI	NCIC 9340
City SANTA CLARA	Population 6	Rpt Dist	Beat 120	Type 1
Primary Collision Factor UNSAFE SPEED	Violation 22350	Collision Type	REAR END	Severity INJURY
Weather 1 CLOUDY	Weather2 RAINING	Road Surface WET	Lighting DAYLIGHT	Post Action
Motor Veh Involved With	OTHER MV			
PARTY INFO		VICTIM INFO		
Party Type Age Sex Race Sobriety1 Sobriety2	Motor Veh Coll Dir SW Veh CHP Veh Make Year Sp Info OAF1 Viol OAF2 Safety Equip	Role	Ext of Inj	Age Sex Seat Pos Safety Equip Ejected
1F DRVR 58 M W HNRD	PROC ST S A 0100 FORD 2001 - 3 F - M G			
Primary Rpt RT 101	Distance (ft) 4	Direction S	Secondary Rpt GREAT AMERICA PI	NCIC 9340
City SANTA CLARA	Population 6	Rpt Dist	Beat 120	Type 1
Primary Collision Factor UNSAFE SPEED	Violation 22350	Collision Type	HIT OBJECT	Severity INJURY
Weather 1 CLOUDY	Weather2 RAINING	Road Surface WET	Lighting DAYLIGHT	Post Action
Motor Veh Involved With	OTHER OBJ			
PARTY INFO		VICTIM INFO		
Party Type Age Sex Race Sobriety1 Sobriety2	Motor Veh Coll Dir SW Veh CHP Veh Make Year Sp Info OAF1 Viol OAF2 Safety Equip	Role	Ext of Inj	Age Sex Seat Pos Safety Equip Ejected
1F DRVR 19 M A	FATG PROC ST N A 0100 BMW 1985 - 0 N - G			
Primary Rpt RT 101	Distance (ft) 1320	Direction N	Secondary Rpt GREAT AMERICA PI	NCIC 9340
City SANTA CLARA	Population 6	Rpt Dist	Beat 120	Type 1
Primary Collision Factor IMPROP TURN	Violation 22107	Collision Type	BROADSIDE	Severity PGO
Weather 1 CLOUDY	Weather2 RAINING	Road Surface WET	Lighting DARK - NO ST LTS	Post Action
Motor Veh Involved With	OTHER MV			
PARTY INFO		VICTIM INFO		
Party Type Age Sex Race Sobriety1 Sobriety2	Motor Veh Coll Dir SW Veh CHP Veh Make Year Sp Info OAF1 Viol OAF2 Safety Equip	Role	Ext of Inj	Age Sex Seat Pos Safety Equip Ejected
2 DRVR 29 M H HNRD	PROC ST N A 0100 JEEP 1995 - C N - G			
Primary Rpt RT 101	Distance (ft) 200	Direction S	Secondary Rpt GREAT AMERICA PI	NCIC 9340
City SANTA CLARA	Population 6	Rpt Dist	Beat 120	Type 1
Primary Collision Factor UNSAFE SPEED	Violation 22350	Collision Type	REAR END	Severity PGO
Weather 1 CLEAR	Weather2 DRY	Road Surface DRY	Lighting DAYLIGHT	Post Action
Motor Veh Involved With	OTHER MV			
PARTY INFO		VICTIM INFO		
Party Type Age Sex Race Sobriety1 Sobriety2	Motor Veh Coll Dir SW Veh CHP Veh Make Year Sp Info OAF1 Viol OAF2 Safety Equip	Role	Ext of Inj	Age Sex Seat Pos Safety Equip Ejected
1 DRVR 29 F A HBD-NUJ	STOPPED PROC ST N A 0100 BMW 2001 - 3 G - M G			
2 DRVR 29 F A HBD-NUJ	PROC ST N A 0100 FORD 2002 - 3 G - M G			

IMAGE 6

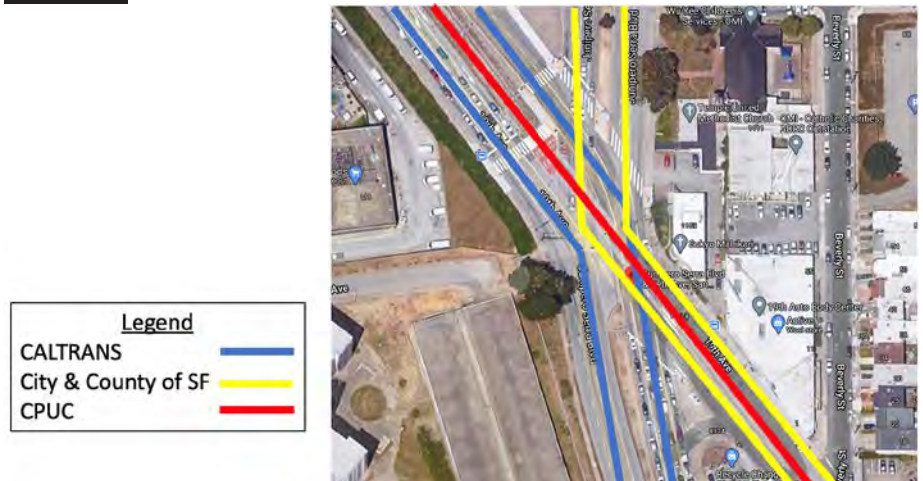


IMAGE 7



they can't be seen be a driver to help to observe pedestrians.

Make a Site Inspection with an Expert

Go to the scene with an expert such as a traffic engineer, to identify what defects and issues there are with the roadway. Look for line of sight issues, such as bushes grown up around a stop sign; the entrance to the roadway is not long enough to allow a safe merge with traffic; multiple skid marks show sudden stops; or missing traffic signs.

Canvas the Neighborhood

Neighbors may have complained before the accident about the intersection being unsafe, or about speeding, or about lack of line of sight to safely make a turn. Notice to the entity in time to make a repair or warn of the dangerous condition is crucial. A defense includes insufficient time and money to make the repair. However, if they cry poor, remember that they still must make a reasonable attempt to warn of the condition.

Publicly Available Documents

Many government roadway documents can be found online:

- Project study reports
- City and County master plans
- Pedestrian and Bicycle plans
- Transportation studies and plans
- Corridor studies
- Regional transportation plans
- Annual Average Daily Traffic (AADT) studies
- Public Hearing data (minutes and videos of city and county boards)

(See Image 8 – 19th Avenue Corridor Study)

DISCOVERY DURING LITIGATION

Written Discovery:

Discover the “Story of the Road” through document requests.

Ask the public entity for documents which show the history of the road. This includes construction documents which include the road design plans and the “as built” plans, all the permits, right of way documents to show who has the discretionary authority over the roadway, all past construction documents for repairs,

IMAGE 8

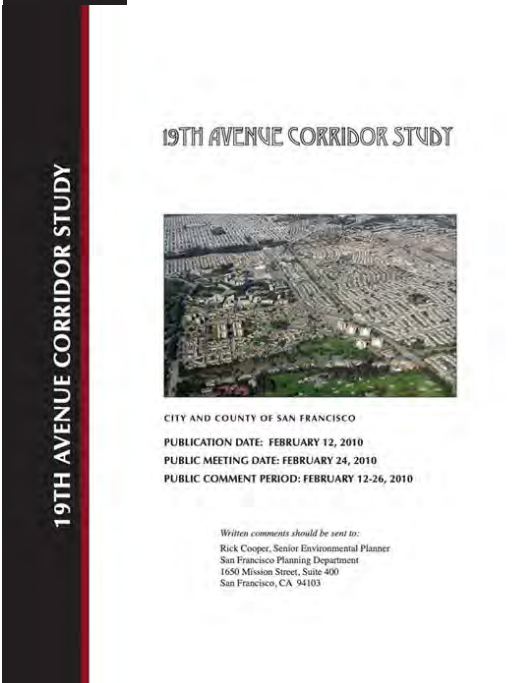


IMAGE 9



re-striping, changes to signage, lighting, etc. Ask for any planned construction documents. There may have been plans to change the road which were never carried out or delayed, and since the proposed expenditure must be justified, you may find an admission of the need for changes or repairs. (See Image 9 – plans.)

Outside Contractors' Data

Many cities and counties use outside consulting firms to develop data for use in planning and getting transportation money

from the state and federal government. These include pedestrian counts, traffic counts, intersection studies, feasibility studies, environmental impact studies.

These studies often describe the need for changes in the roadway because it is unsafe and the rationale for the changes.

Highway Design Manual and the California MUTCD

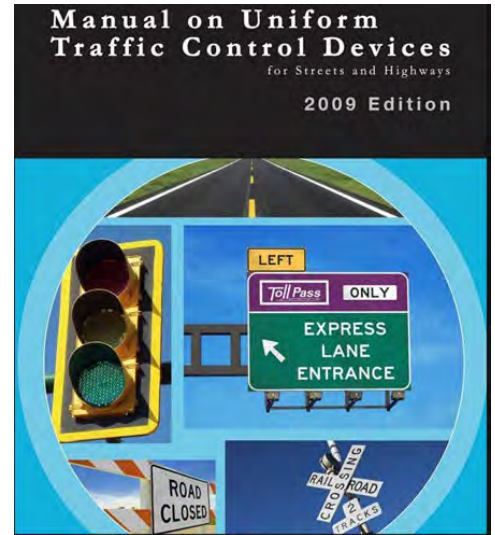
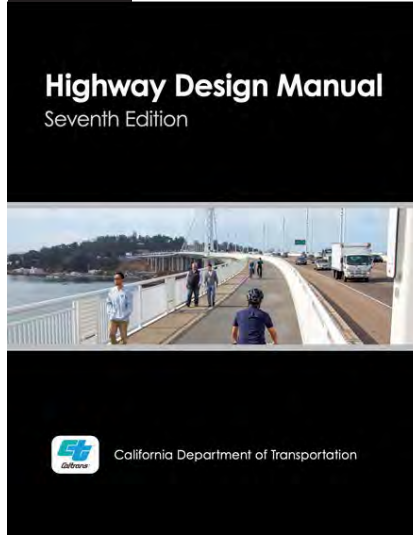
Check the California Manual on Uniform Traffic Control Devices (MUTCD) which provides uniform standards and

specifications for all official traffic control devices in California. Check for the standards at the time the road was built and at the time of the collision, as changes in standards over time alone do not create liability. Look for changes in standards that address your dangerous condition and can be tied to other collisions/incidents. (See Image 10 – Highway design manual and MUTCD)

Photo Logs

Some public entities, particularly CalTrans, take photos routinely of their roads and keep them in a log for each specific road. The photo log gives a visual history of the road, deterioration, changes and line of sight problems.

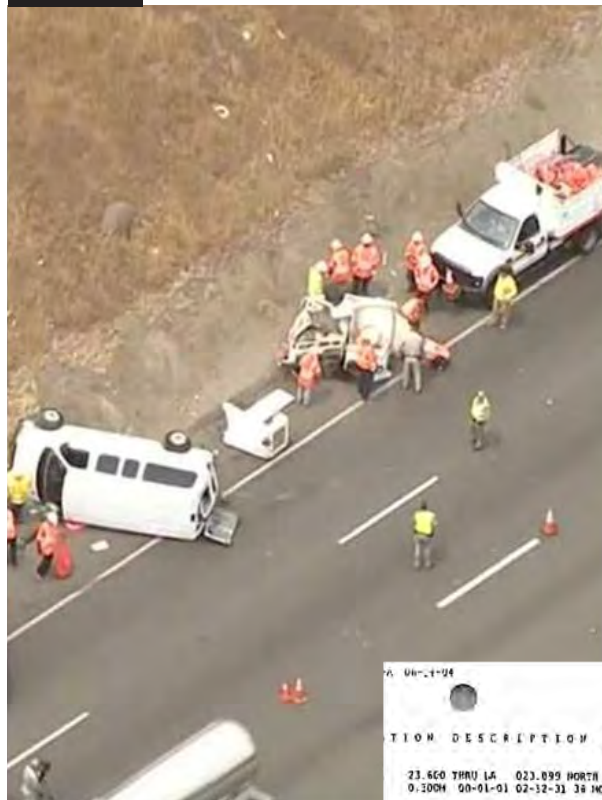
IMAGE 10



Delegated Maintenance Agreements

Sometimes public entities will contract with another public entity to maintain their road. For example, the county may own the road, but the city maintains it by contract, and the city may indemnify the county for any claims arising out of failure to maintain. Both entities may need to be sued. Another example is that CalTrans will often delegate the maintenance of traffic lights to cities or counties. The city or county traffic engineer will then often make changes to the associated light timing sequences and not obtain formal approval from CalTrans to make the change. By statute, CalTrans cannot delegate approval authority, so there would be no design immunity.

IMAGE 11



Light Timing Sequence Documents

If the timing of a light is at issue, there are timing sequences that may have changed over time or been studied to make changes. If there is a history of repeated changes to the sequence, it probably means the traffic engineer is struggling with some form of traffic flow issue and potentially a dangerous condition!

Collision Data from CalTrans

Once in litigation the documents you should request include: SWITRS (what is produced may be different than what is publicly available), collision reports, collision patterns, maintenance and repair records, repaving records. (See Image 11 – accident scene and printout.)

SELECTIVE ACCIDENT RATE CALCULATION ROUTE SEQUENCE

SECTION	DESCRIPTION	PA-GRY	NUMBER OF ACCIDENTS/SIGNIFICANCE*							PER KLD	PDRY	A-5B
			TOT	FAT	INJ	FAT	VEN	NET	DARK			
23.600 THRU LA	023.899 NORTH	844	20	0	6	6	18	1	3	0	27.1	9
0.300M	00-01-01 02-12-31	38 MO (U)										
23.600 THRU LA	023.899 SOUTH	844	13	0	3	7	17	2	5	0	27.7	10
0.300M	00-01-01 02-12-31	38 MO (U)										
23.600 THRU LA	023.899 NORTH	844	9	0	3	3	9	0	0	0	27.2	5
0.300M	00-01-01 03-12-31	12 MO (U)										
23.600 THRU LA	023.899 SOUTH	844	6	0	0	3	5	0	4	0	27.2	0
0.300M	00-01-01 00-12-31	12 MO (U)										
23.600 THRU LA	023.899 NORTH	844	8	0	1	1	7	1	2	0	28.0	2
0.300M	01-01-01 01-12-31	12 MO (U)										
23.600 THRU LA	023.899 SOUTH	844	5	0	2	2	4	1	3	0	28.0	2
0.300M	01-01-01 01-12-31	12 MO (U)										
23.600 THRU LA	023.899 NORTH	844	3	0	2	2	2	0	1	0	28.0	2
0.300M	02-01-01 02-12-31	12 MO (U)										
23.600 THRU LA	023.899 SOUTH	844	8	0	5	5	8	1	2	0	28.0	5
0.300M	02-01-01 02-12-31	12 MO (U)										
23.600 THRU LA	023.899 NORTH	844	0	0	0	0	0	0	0	0	28.0	0
0.300M	02-01-01 03-23-31	2 MO (U)										
23.600 THRU LA	023.899 SOUTH	844	1	0	3	0	1	0	0	0	28.0	0
0.300M	03-01-01 03-03-31	3 MO (U)										

Collision Data from the City, County and PUC

Request all collision reports, incident reports (there is a difference!), past and future construction studies, and city maintenance records. Look for PUC light rail and heavy rail documents, including Safety and Enforcement Division investigations. These are not admissible at trial, but the investigations can guide your discovery plan.

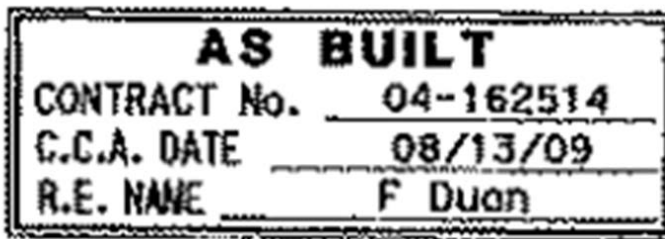
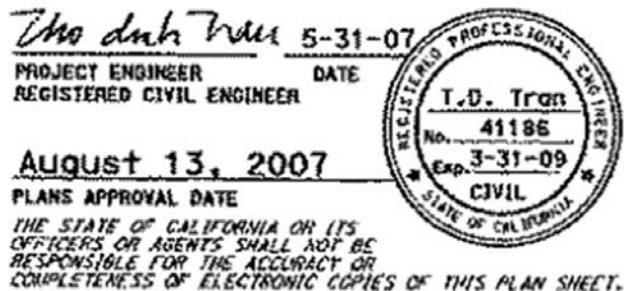
Depositions

Depositions to be taken in a dangerous condition of public property include the police officers and other first responders at the scene; the design and signatory engineers (they can be different!); the person most qualified on subjects like the design drawings, repairs, contracts, etc. (See Image 12 – engineer signatures.)

Experts

Expert traffic design engineers, conspicuity experts, human factors experts and others needed to prove the dangerous condition should be hired early to guide your discovery, to prepare for summary judgment motions and for trial.

IMAGE 12



CONCLUSION

Plaintiff lawyers bringing dangerous condition of public road lawsuits create change to prevent injuries and save

lives. The crosswalk that is painted, the lane barrier that is built, the light sequence that is changed, show how our work makes a safer world. ■