

One Minute Brief

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TOPIC: Striking Testimony

ISSUE: When an opposing party cannot fully cross-examine a witness, must the court always strike the witness's entire testimony?

Both the People and the defendant have a right to cross-examine witnesses at trial. (Evid. Code, §§ 711, 773, subd. (a); see *People v. Lena* (2017) 8 Cal.App.5th 1145, 1149.) "Where a witness refuses to submit to cross-examination, or is unavailable for that purpose, the conventional remedy is to exclude the witness's testimony on direct." (*Fost v. Superior Court* (2000) 80 Cal.App.4th 724, 735.) This is so even when the refusal to answer is based on a valid claim of privilege. (*Id.* at pp. 735–736.)

Because of this, courts often believe they must strike all of a witness's testimony if there is *any* curtailment of cross-examination, even if minor or on a collateral matter. For example, when a witness is currently charged with an unrelated crime and invokes the privilege against self-incrimination when asked about it, the opposing party will often ask the court to strike all of the witness's testimony, citing a denial of cross-examination. This can then create thorny issues involving whether to grant the witness immunity.

But the court need not always strike a witness's entire testimony for every cross-examination issue, no matter how minor. The right to cross-examine is not absolute (*People v. Villa* (2020) 55 Cal.App.5th 1042, 1051) and striking a witness's entire testimony is a "drastic solution" (*People v. Sanders* (2010) 189 Cal.App.4th 543, 556). Instead, "[t]he decision whether to strike the direct examination, or a partial strike of the testimony, of a witness who does not submit to cross-examination is left to the discretion of the trial court." (*People v. Noriega* (2015) 237 Cal.App.4th 991, 1001.) In considering the proper remedy, "the trial court should examine 'the *motive* of the witness and the *materiality* of the answer.'" (*People v. Seminoff* (2008) 159 Cal.App.4th 518, 525–526; *People v. Reynolds* (1984) 152 Cal.App.3d 42, 47.)

Because of this, the court must strike a witness's entire testimony only if there is a *total* refusal to submit to cross-examination (see *People v. Robinson* (1961) 196 Cal.App.2d 384, 390), or where the "subject matter of the cross-examination" goes to the "heart of the controversy"—i.e., it is on the same subject as, and is necessary to fairly evaluate, the witness's direct examination testimony. (*Id.* at p. 389; *People v. Sanders* (2010) 189 Cal.App.4th 543, 554.)

On the other hand, the court need not strike the witness's direct testimony when the cross-examination involves only collateral matters related to witness credibility, not the substance of the direct testimony.

For example, in *United States v. Cardillo* (2d Cir. 1963) 316 F.2d 606, a prosecution witness admitted having an extensive criminal record, but he refused to answer questions about pending criminal charges in other cases. The trial court nevertheless declined to strike his testimony, and the Second Circuit held there was no error: “These questions were purely collateral for they related solely to his credibility as a witness and had no relation to the subject matter of his direct examination.” (*Id.* at p. 611.)

As another example, in *People v. Sanders* (2010) 189 Cal.App.4th 543, one prosecution witness, Lanny, testified extensively about a shooting, identifying the shooters as defendant Sanders and another suspect, “S-1.” Lanny’s testimony included hearsay evidence about the identity of S-1. Though extensively cross-examined on this, Lanny refused to name the people who had given him this information. The defense moved to strike all of Lanny’s testimony, but the court declined, instead instructing the jury that they may consider Lanny’s refusal to answer these questions when evaluating his credibility. The Court of Appeal held this was not error. Relying on *Cardillo* and citing other California cases, the court held:

[T]here is solid support, both judicial and scholarly, for the proposition that when one or two questions asked during cross-examination are at stake and those questions relate to a collateral matter such as the nonparty witness’s credibility, the trial court need not strike the entirety of that witness’s direct testimony.

(*Id.* at p. 556.) And the court ultimately concluded that the court’s instruction regarding Lanny’s credibility adequately protected the defendant’s right to cross-examination. (*Id.* at pp. 557–558.)

Relatedly, if the subject matter of the cross-examination relates only to a distinct area of the direct examination, the court may consider striking only that part of the testimony. For example, in *People v. Robinson* (1961) 196 Cal.App.2d 384, a burglary case, defendant’s accomplice, Lee, testified about their theft from a warehouse. After testifying that they sold the property, he refused to name the person to whom he sold one item, an acetylene torch cable. The court struck Lee’s testimony related to the disposition of property, but declined to strike his testimony about the burglary. The Court of Appeal held this was not error: “[T]he witness refused to answer but one question which, though relevant to the credibility of the witness, had no bearing on the actual elements of the crime of burglary with which the defendant was charged.” (*Id.* at p. 389.)

Beware: Some questions might involve “credibility” but are not necessarily “collateral” if they are central to understanding and assessing the witness’s direct testimony. In *People v. Seminoff* (2008) 159 Cal.App.4th 518, the defendant’s girlfriend and codefendant testified at a suppression hearing that marijuana found in their room belonged to her and that there was no marijuana odor because of its packaging. But she invoked the Fifth Amendment when asked whether she possessed the marijuana for sale. The court held the unanswered questions were not merely collateral because they bore directly on her interest in the case and were crucial to assessing her credibility. (*Id.* at pp. 525–526.)

BOTTOM LINE: A court should strike all of a witness’s testimony if he or she cannot be cross-examined on the subject matter of his or her direct testimony. But where cross-examination involves only collateral credibility matters, or a minor issue, the court may consider lesser remedies.

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