

Lessons From Key Expert Testimony In Chauvin Trial

By **Harlan Prater and Logan Matthews**

On April 20, former Minneapolis police officer Derek Chauvin was found guilty on all charges of murder involving the death of George Floyd.

The guilty verdict in State of Minnesota v. Derek Chauvin followed a near-three-week trial and presentation of 43 witnesses, including store clerks, fellow police officers, eye witnesses, family members, and experts. But one witness stood out from them all: Dr. Martin Tobin, a pulmonologist who was called as the prosecution's expert on breathing.

Tobin gave a gripping account of the cause of Floyd's death, which he attributed to a lack of oxygen. His testimony made national headlines as reports from the courtroom gave accounts of jurors — some of whom had been caught sleeping during other portions of the trial — paying close attention, actually taking notes, and even palpating their own necks during one of his demonstrations.

So, what was it about Tobin's testimony that made him so compelling? And, what lessons can trial lawyers of all types learn from his time on the stand?

Tobin was credible.

Tobin is, after all, a medical doctor, but not all medical doctors are inherently credible. While jurors often seem to have an affinity for qualified medical doctors, that can be undermined by arrogance, verbosity, so-called doctor speak, and a lack of candor.

Tobin certainly is qualified. He has authored what many have called the bible of the field of mechanical ventilation; he has been published multiple times in the New England Journal of Medicine for his work in pulmonology; and he is a physician in pulmonary and critical care medicine at Edward Hines Jr. V.A. Hospital and Loyola University Medical Center.

But it is not Tobin's credentials that made him so credible. It is something else.

Being an expert witness is tough. Experts are asked to give opinions about things after the fact, often without a complete factual record. They're asked to make assumptions and answer hypothetical questions, most of which are incomplete.

In doing so, experts have to make judgment calls about where to give ground and where to hold firm. And all of these things only matter if the jury believes you.

That's what made Tobin so compelling. Everything from his use of hand gestures, facial features and cordiality with the court and opposing counsel, to his eye contact with jurors and earnestness with which he explained the minutia of the case, made him a very credible witness.

For trial lawyers, the importance of presenting credible witnesses cannot be overstated. For expert witnesses, it is even more crucial.



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Often lawyers get caught up trying to find the most knowledgeable expert in a given field. But a qualified expert's ability to appear credible before a jury is perhaps more important than any other quality. It certainly helps when you find an expert with both qualifications and credibility, like Tobin.

Tobin was organized.

When giving a presentation, it is often said that you should tell your audience what you are about to tell them, tell them, and then tell them what you told them. For expert witnesses, the same thing is true. Much of an expert's ability to do that depends on a trial lawyer's skill in drawing out that testimony, along with solid preparation.

At the outset of his testimony, the prosecutor asked Tobin if he had reached an opinion about the cause of Floyd's death. Tobin responded that he had.

He said Floyd died due to a lack of oxygen, and that the lack of oxygen was caused by four things: (1) Floyd resting on the pavement, (2) Floyd's hands being cuffed behind his back, (3) Floyd being held in the prone position, and (4) Chauvin's knee to Floyd's back, arm and neck.

The prosecutor then took Tobin through each of the four factors contributing to Floyd's lack of oxygen, and Tobin followed a similar rubric with each.

First, he would describe a general concept; then he would use an illustration or demonstrative aid to explain the concept. Next, he would apply that concept to Chauvin's actions in the case, and finally, he would explain the significance of it to Floyd's death. After explaining the four areas, the prosecutor asked Tobin to summarize them for the jury.

Having an organized structure for presentations, like Tobin's, is critical for expert witnesses to be effective.

Often jurors are asked to understand complicated concepts that may have taken an expert a lifetime to master. Providing jurors an analytical framework to understand those concepts can give them an expectation about where the speaker is headed next. It allows a juror to relax, so to speak, and to know that the expert is not going to put them in the deep end of the pool without first teaching them how to swim.

In short, a presentation that is accessible, appealing and repeatable allows jurors to find anchors upon which they can rely.

This is where lawyering matters. It is critical to outline the opinions and topics that your expert is going to testify about, and then to guide the jurors through those opinions and topics in an easy-to-understand fashion.

Experts, like all of us, have a tendency to speak about things as though our listeners have the same background and level of understanding. We do this because we expect that if a listener doesn't understand, they will speak up and ask follow-up questions.

The problem for jurors, though, is that they generally cannot ask questions. When testifying to a jury, it is important for experts to explain concepts in a standard format, so that it is easy to follow, captures the jurors' attention, and can be repeated to other jurors during deliberations.

Tobin used common language.

Tobin is a world-renowned pulmonologist who certainly can identify the medical diagnosis or cause of Floyd's death. But when asked whether Floyd experienced hypoxia and asphyxia, Tobin agreed, but said that he didn't think those words were particularly helpful. He then explained that those words really meant the same thing: Floyd had a low level of oxygen.

The simplicity of Tobin's presentation was compelling. It draws a listener in, rather than walling anyone off.

It helped that Tobin is a medical doctor who undoubtedly has been taught about proper bedside manner. He's likely comforted many families through difficult decisions in his daily work in the intensive care unit. And it is that bedside manner that made him particularly compelling on the witness stand.

Instead of speaking over the jury — or showing off his vast medical terminology — Tobin followed a disciplined approach of breaking down terms and phrases into common language.

This is a common error for experts today. Many use big or scientific words when a small or common word will do.

An expert in a case our firm handled involving property damage once referred to problems as *Reticulitermes* versus *Coptotermes Formosanus*. These are just scientific names for varying species of termites.

The jurors likely did not care that the expert knew the scientific name for them. Instead, what jurors are interested in — as all jurors should be — is learning the truth. If a home has termite damage, say so. In Floyd's case, he suffered from a lack of oxygen, so that's what Tobin told the jury.

Using common language involves a level of touch. Of course, the balance in testifying about a complicated subject is not to insult the intelligence of the jury. A trial lawyer should work with his or her expert to identify those words that are not common or easy to understand and make them more relatable and repeatable.

Tobin used effective demonstrations.

During a portion of his testimony, Tobin described the anatomy of the human neck. He said, if you put your hand on the back of your neck, you can feel the styloglossus tendon, which is so hard it feels like wood.

At another point in his testimony, Tobin described the change in size of your neck as you breathe. He said that if you put your fingers just above your Adam's apple, you can feel your hypopharynx expand and contract, as you breathe. As he was describing these things, jurors reportedly began palpating their own necks as they breathed.

It was here where Tobin's testimony was most informative. He was not only describing a process verbally and showing it on a screen, but he was also engaging with the jurors through a demonstration.

At one point the defense objected, and the court instructed the jury that they were not required to do anything Tobin was explaining. This reportedly had the opposite effect.

Lawyers are not allowed to ask jurors to put themselves in the shoes of a party. This is off-limits under what's known as the Golden Rule, because it asks jurors to make decisions based upon an emotional appeal or bias, rather than the facts of a case in evidence.

But an expert may still be able to pose hypothetical situations to a jury, such as "if you do X, then you'll notice Y," and a jury may follow along on their own. The expert cannot demand that a jury follow along, but he or she may extend the invitation.

The effect of such an invitation, as we saw in Tobin's testimony, was that when he later described how Chauvin's knee to the side of Floyd's neck made it difficult if not impossible for Floyd's neck to expand, the jurors were effectively in the shoes of Floyd. They could understand the significance of Chauvin's knee to Floyd's neck and how that could have led to a lack of oxygen, as Tobin had described.

Tobin effectively rebutted alternative theories.

Chauvin's defense centered on alternative causes of Floyd's death, including preexisting heart disease and the use of fentanyl. Tobin rebutted those theories on his direct examination.

First, he described how fentanyl would decrease Floyd's breathing from an average of 22 breaths per minute to around 10 breaths per minute. He then showed 17 seconds of body camera footage where jurors were able to see Floyd breathe seven to eight times. He then extrapolated those 17 seconds to state that Floyd was breathing at the normal rate of 22 breaths per 60 seconds.

Tobin also dispelled the notion that heart disease caused Floyd's death. If heart disease caused his death, Tobin said he would expect to see shortness of breath which, again, was dispelled by Floyd's normal rate of breathing.

It goes without saying that, if your party bears the burden of proof at trial, you must rebut known alternative theories. Experts can do this effectively if properly prepared. This is where lawyers must communicate with their experts.

In Tobin's case, what was particularly useful about his testimony was not that he was able to reject these alternative theories, but rather how he was able to do so.

A juror may be skeptical when an expert disagrees with an opposing side or an expert for the opposition. But if your expert can demonstrate, through video like Tobin did, why the opposing party's theory is wrong, it can be very effective. This of course requires parties to comply with their pretrial obligations and for lawyers to communicate with an expert to make sure the opposing party has fulfilled its obligations of appropriate disclosure.

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