

# People v Whittaker: The Trial and Its Aftermath in California

Reginald Carter, PhD, PA; Adonna Thompson, MLS;  
Physician Assistant History Center at the Duke University  
Medical Center Archives, Durham, North Carolina  
Bill Stanhope, MS, PA, Saint Louis University

It used to be said that you had to know what was happening in America because it gave us a glimpse of our future. Today, the rest of America, and after that Europe, had better heed what happens in California, for it already reveals the type of civilization that is in store for all of us.

— Alistair Cooke, British broadcaster, journalist

## INTRODUCTION

Cooke's remarks about California are prophetic when it comes to the development of the physician assistant (PA) profession. California's rapid population and economic growth during and following the Pacific war with Japan was unprecedented in American history. It is therefore not surprising that California would be among one of the first states to express concern about its ability to produce enough doctors to meet a growing demand for health care services.<sup>1</sup> Like the rest of the nation, California was experiencing a growth in demand for health care caused by passage of Medicare legislation in 1965, growing demands of civil right and migrant farm workers for health care benefits, and advances in diagnostic and therapeutic capabilities. The use of ex-military corpsmen to bolster medical, nursing, and allied

health care services was viewed by many in California as a logical way to address the problem of manpower shortages. The simplicity of this concept failed to recognize the professional divide and protectionism that would become evident when the professions were asked to participate in defining a new type of health professional — the physician assistant (PA). It also revealed a lack of clarity in and understanding of licensure laws and the interpretation of these laws by California's courts.<sup>2</sup> The *People v Whittaker* trial which took place in Redding, California, in December 1966 underscored the need for legislative initiatives and policymaking decisions that for too long had been neglected.

## The California Scene

California began using ex-military independent corpsmen to help deliver health care services to prison inmates in 1949, following a precedent established by the US Public Health Service in the 1930s. In addition, to meet a growing demand for health care service during the 1950s, nurses were asked by physicians to handle more medically oriented tasks in clinical decision-making. This "expanded role" of nurses created a growing discrepancy between common practice and law. To address this issue, the nursing, medical, and hos-

## PA HISTORY

### Note:

*Shasta County v Whittaker* is a seminal event that helped institutionalize the PA profession. The trial's notoriety and adverse outcome for the defendants caught the attention of many medical societies, medical boards, and individual physicians who supported the use of informally trained assistants to help reduce physicians' workloads.

Ironically, the judgment against the defendant likely strengthened the development of the PA profession in the long run. The verdict that Roger Whittaker had "engaged in the unlicensed practice of medicine" was a strong impetus for health policy makers to develop the first round of enabling legislation that ushered PAs into American medicine.

The trial, which questioned the "right" of physicians to delegate medical tasks to "untrained assistants," pressured several states to establish formal PA training programs. Dr. Malcolm Todd led the AMA to develop accreditation standards for emerging PA programs and to create a national certifying examination in partnership with the National Board of Medical Examiners.

On a personal note, Roger and I were classmates at Duke University, where we graduated in 1969. He was one of the original founders of the AAPA, serving as its first treasurer. Roger had a vision that one day the AAPA would have its own building, facilitate the development of new programs, provide high-quality continuing medical education, and have an international membership. Roger gave unselfishly to the AAPA and is remembered for his work ethic, zest for life and unwavering, absolute commitment to the maturation of the PA profession.

— William Stanhope, MS, PA

Figure 1. George Stevenson and Roger Whittaker During the Trial, Redding, California



Courtesy of *Record-Searchlight*, Redding, CA, December 22, 1966.

hospital associations began to draft and issue a continuing series of joint statements defining the appropriate preparation and conditions under which registered nurses could assume clinical tasks once performed primarily by physicians. These statements were used as standards for the delegation of tasks and responsibilities and circumvented the need to enact legislation or establish formal regulations by their respective medical and nursing licensing agencies.<sup>3</sup>

Academic medical centers in California, as in many other states, were facing shortages in clinical support personnel during the 1960s and were hiring ex-military corpsmen to bolster their work force. One of these ex-corpsmen, Roger Whittaker, a former US Navy corpsman trained as a surgical technician, was hired by the University of California at San Francisco.<sup>4</sup> At the same time, Duke University in Durham, North Carolina, was also hiring ex-military

corpsmen to work as clinical technicians in their dialysis and clinical research units. These corpsmen would become Dr. Eugene A. Stead's first source of students for the 2-year PA program he established at Duke University in 1965. That same year, at the University of Colorado in Denver, Dr. Henry K. Silver joined Loretta C. Ford, EdD, RN, to begin the country's first pediatric nurse practitioner (PNP) training program.<sup>5</sup>

### The Legal Climate in California

Two landmark cases are cited for setting the tone in California regarding the ability of physicians to delegate medically related clinical tasks to nonphysician personnel. In the first case, *Chalmers-Francis v Nelson* (1936), the California Supreme Court ruled that the defendant, Dagmar Nelson, a nurse anesthetist, was not engaged in the illegal practice of medicine when she administered general anesthesia

under the direction of a surgeon. The court's reasoning was that what Nelson had done was in accordance with the uniform practice in operating rooms, and it was reluctant to rule on a decision it felt was more appropriately made by the medical community. The court further reasoned that the nurse anesthetist was acting within the state's statutes since she was "carrying out the orders of the physician to whose authority they are subject. The surgeon has the power, and therefore the duty, to direct the nurse and her actions during the operation."<sup>6</sup> The court's ruling was brief and did not define what "supervision" encompassed.

The second case, *Magit v Board of Medical Examiners* (1961), also involved the administration of general anesthesia. But in this case, rather than this being done by a registered nurse as in the Nelson case, the chief of anesthesiology at a California hospital had hired unlicensed foreign medical graduates to work as anesthetists. For doing so, he was charged with violating the California Medical Licensing Act. His defense was that it was a "common and recognized practice in California and in other parts of the United States for licensed physicians to authorize and permit persons not licensed as physicians to administer anesthetics"<sup>3</sup> and he cited *Chalmers-Francis v Nelson* as a test case. The Supreme Court of California, however, ruled that allowing a licensed nurse to administer anesthesia did not mean that any unlicensed person could do so, and that foreign medical graduates were not covered by the Nursing Practice Act.<sup>7</sup> Interestingly, if they had been enrolled in a medical postgraduate residency program or been employees working in a state-owned facility, the foreign medical graduates could have administered anesthesia under an exception to the Medical Practice Act.<sup>3</sup>

So the stage was set for a third trial to occur in California, *Shasta County v Whittaker* (1966). This trial once more called into question the right of a physician to delegate tasks to a subordinate. In this case, a jury was asked to decide who is providing treatment when a physician asks a subordinate to carry out a medical task; the physician who gave the orders or the subordinate who carries out the orders?

### **George Stevenson and Roger Whittaker**

The two central figures in the trial were the ex-corpsman Roger Whittaker and his “supervising physician,” neurosurgeon George Stevenson. The two had much in common.

George Stevenson was born in 1935 in Greencastle, Indiana, a 45-minute drive west of Indianapolis and the home of DePauw University. He developed an interest in biology, zoology, and comparative anatomy at Oberlin College, Ohio, which led him to Case Western Reserve Medical School, where he graduated in 1960. He did his medical internship at Columbian Presbyterian Medical Center in New York City, where he began to read about neuroscience, neurosurgery, and neurology at the Neurological Institute library. He decided that the life of a neurosurgeon was for him — he liked technical things and learning manipulative skills.

He was accepted into the neurosurgery residency program at the University of California at San Francisco in 1961. While there he and a fellow resident perfected a procedure for operating on an “inoperable brain tumor,” located at the base of the brain. The case was published in the *Journal of Neurosurgery* and was reported in *Time* magazine in April 1965. After completing his residency, Stevenson decided to move

his young family, which included four children, from San Francisco to Redding, a small town in northern California. This was a big decision. Not many neurosurgeons were willing to leave major urban communities with large medical centers that could afford the expensive equipment needed to perform neurosurgical procedures. Stevenson would be the only neurosurgeon in a vast rural area of California. However, Redding was near the Sierra Mountains and Stevenson loved the outdoors. He had a particular interest in elk.<sup>8</sup>

Roger Whittaker was born in 1940 in Kansas City, Missouri. After high school, he entered the US Navy and was trained and worked as a surgical technician assigned to the Marines and served on the aircraft carrier *USS Midway*.<sup>9</sup> While in the Navy, Whittaker not only served as a “circulating corpsman in the operating room” but also first assisted in surgery on more than 125 cases.<sup>10</sup> His outstanding military record, experience, and recommendations landed him a job as a surgical technician at University of California at San Francisco in 1963.

It wasn't long before Whittaker caught Stevenson's attention. Stevenson found Whittaker to be an ethical and quiet person whose technical skills far exceeded those of any of the other surgical technicians with whom he had worked. Because of this, Whittaker was asked to help with an operation that brought national recognition to the surgical team at the University of California hospital in San Francisco. The operation required the use of a microscope; one had to be borrowed from the ophthalmology department, moved a quarter of a mile, sterilized, and secured for the operation. This was Whittaker's job and he did it well. The operation took 12 hours to complete.<sup>8,9</sup>

Whittaker shared Stevenson's love of the outdoors and fishing. So when

Stevenson called him, within a month of opening his neurosurgical practice in Redding, to ask him to move to northern California to help him establish his surgical team, Whittaker did not hesitate; he packed his bags and he and his wife left San Francisco for Redding.

### **Events Leading Up to the Trial**

On May 14, 1965, the local newspaper, the *Record-Searchlight*, announced the expected arrival of Stevenson — Redding's first neurosurgeon — on July 1. The paper declared that he would be the only neurosurgeon between Sacramento and Medford, Oregon, and between Reno and Eureka. The paper also stated that both Mercy and Memorial hospitals had spent months getting ready for his arrival sending nurses to the University of California Medical Center at San Francisco to observe neurosurgery.<sup>11</sup> In reality, Stevenson would perform most of his operations at Memorial hospital since its administrator, Robert Roberts, had purchased the expensive instrumentation and microscope needed for this delicate surgery and expanded the hospital's intensive care unit to meet the increased demand for the postoperative care of Stevenson's patients. Roberts also approved Whittaker's assisting Stevenson in the operating room and having him train nurses and other support personnel about neurosurgical instrumentation and procedures. His use of one hospital more than the other eventually led to the charges made against him and Whittaker. For it was a plastic surgeon, Dr. William Shadish, who worked primarily at Mercy Hospital that asked for the inquiry into Stevenson's use of Whittaker to assist with surgery.<sup>8</sup>

The lead-up to the trial began when Whittaker received a letter from Robert W. Baker, district attorney of

Shasta County, on September 29, 1966, stating that a complaint had been filed charging him with three counts of violating Section 2141 of the Business and Professions Code of the state of California. He was asked to appear before a judge within 10 days or a warrant would be issued for his arrest. The same day, the *Record-Searchlight* announced: "Shasta DA files charges against Redding surgeon." The DA indicated that he filed the charges against Stevenson following an investigation by the state's Board of Medical Examiner investigators. The paper also mentioned that Stevenson had announced earlier in the month that he was trying to obtain federal funding to build a \$3.5 million regional medical center in Redding on behalf the Shasta-Memorial Neurovascular and Rehabilitation Institute, which he headed. Stevenson is quoted as saying that one provision of the federal program was the maximum use of paramedical personnel, such as ex-military corpsmen, as assistants to physicians.<sup>11</sup>

Both Stevenson and Whittaker denied the charges during an arraignment held October 11, 1966, in Redding Justice Court. Whittaker was charged with drilling burr holes in a patient's skull and suturing the head of a patient. The following day the *Record-Searchlight* noted that the lawyer for Stevenson and Whittaker, Fredrick A. Cone of San Francisco, had appeared on a local television newscast saying that the law under which they had been accused was unclear. The newscast stated that the medical profession in California desired greater use of paramedical personnel such as Whittaker and that many of them saw the case against Stevenson and Whittaker as a test of the right of an overburdened doctor to transfer some of his chores to persons who are not licensed to practice medicine.<sup>11</sup>

**Figure 2. Examining operating room exhibit during trial: foreground left to right, Dist. Atty. Robert W. Baker, Dr. George C. Stevenson, Defense Atty. Frederick Cone and Roger Whittaker; background, Judge William H. Phelps.**



Courtesy of the *Sacramento Bee*, Sacramento, CA, December 22, 1966.

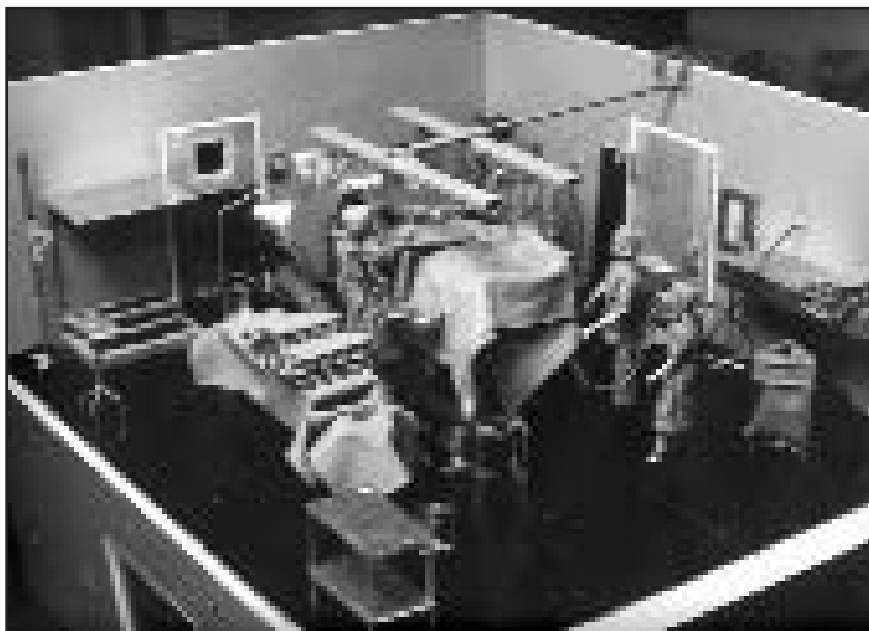
### THE TRIAL

The *Record-Searchlight* chronicled the trial that began on Wednesday December 14 and ended Thursday December 22. After selecting a jury of seven men and five women, District Attorney Robert Baker called his first witness. She was a nurse from Memorial Hospital who testified that she saw Whittaker drill burr holes, apply dressings, and do skull sawing and scalp suturing during cranial operations performed by Stevenson. He asked her if assistants in surgery were generally medical doctors and she replied, "Yes, in most cases." He then asked if she had witnessed surgery in which this was not the case. She said yes, in neurosurgery, when Whittaker was the assistant. In his cross examination, defense attorney Cone got the witness to acknowledge that she and other team members were very busy during an operation and that she only glimpsed portions of the cranial operation. When asked who was in

charge throughout the operation, she said "Dr. Stevenson." Cone followed up with, "There was never any doubt about that was there?" "No" she replied.

The next day, Baker called two local doctors to the stand to confirm that it was important that a physician first assist in surgery unless there was an emergency that dictated otherwise. Cone countered by asking one of the doctors about the availability of physicians in Redding who could serve as neurosurgical assistants and reminded the jury of previous testimony by a neurosurgeon, Dr. James Hayes, who said it was not uncommon for surgical trained assistants to first assist in surgery. On the last day of the trial, five doctors from throughout the United States were called as defense witnesses. One of these doctors was Dr. Eugene A. Stead, Jr. from Duke University. All the doctors were asked what the word "treatment" meant to them. They all agreed that the doctor is responsible

Figure 3. Model of Operating Room Used During the Trial



Courtesy of Society for the Preservation of Physician Assistant History

for treating a patient. But they stressed that when a doctor asks someone else to carry out a task it is still the doctor that is treating the patient, not the assistant.<sup>11</sup>

### The Verdict

After closing remarks by the lawyers, Judge William Phelps read a definition of “treat” to the jury and told them they could consider evidence of custom and usage in the state of California. They were instructed to decide a separate verdict on each of the three charges in accordance with the business and professional code of California. They were to decide whether the cases were emergencies (thereby necessitating surgery before another physician could be found to first assist) and whether Whittaker had actually “treated” any of the patients during the three cases being considered. It took the jury 8 and a half hours to reach a verdict of guilty for both defendants on one of the three charges and not guilty on the other two. Cone asked for a retrial,

claiming that the evidence for the one case of guilt was no more substantial than the other two cases. Phelps denied the request and gave Whittaker a 30-day suspended sentence, fined him \$50, and placed him on one year of probation. Stevenson was fined \$200, given a 30-day suspended sentence, and placed on one year of probation.<sup>11</sup>

### The Aftermath of the Trial

The Whittaker trial made national news when an article about it appeared in *Time* magazine the following week. *Time's* correspondent noted that it all came down to whether Stevenson had tried to get a licensed physician to assist him, at least in cases other than life-threatening emergencies. The jury decided that two cases were true emergencies but one was not and that for this case, Stevenson had time to call a physician to first assist.<sup>10</sup> The trial also caught the attention of national professional organizations and leaders in the fields of medicine, surgery, and

nursing.<sup>3</sup> Letters appeared in the Redding newspaper supporting and denouncing the outcome of the trial, and articles continued in the paper for the next two years as Stevenson appealed the case, first to the appellate court of Shasta County and later to the Supreme Court of California. In each case the appeal was denied by the courts.<sup>11</sup> Because of delays and appeals, it took the California Board of Medical Examiners about six years to hold a hearing to decide whether Stevenson’s license should be revoked. Their decision came on December 8, 1972. Stevenson’s penalty was a nominal suspension of his license for 15 days. The board’s opinion noted that the use of paramedical persons in hospitals had become an accepted practice and that in effect, Stevenson had been on probation for the past six years. It was their opinion that Stevenson had an excellent reputation as a surgeon and had contributed much to the medical community.<sup>12</sup>

During an interview on the day of the conviction, Stevenson indicated that he planned to remain in Redding and continue to practice neurosurgery at Memorial Hospital. He did so for another 30 years. Because of Stead’s willingness to come to his defense, Stevenson became a Stead devotee and they developed a friendship that lasted until Stead’s death in 2005. Unlike Stevenson, Roger Whittaker decided to leave Redding within a few months of the trial. During the trial Stead invited him to come to Duke and enroll in the new PA program. Whittaker took him up on the offer and graduated from the Duke program in 1969, became a national leader in the American Academy of Physician Assistants, and had an outstanding career in surgery and PA education while working for the Department of Veterans Affairs in

Oklahoma City. He died on July 13, 1990, at the VA hospital after battling colon cancer. He was 50 years old at the time.<sup>9</sup>

But Whittaker's trial would not influence California's legal environment for a few more years. One of Whittaker's classmates at Duke, Alfred Bibby, went to work in California after graduating in the summer of 1969. He functioned effectively as a PA in a clinic staffed by nine physicians for several months until he was informed by the business manager of the local hospital that using his services might put the institution at risk. The hospital sought legal advice about what he could or could not do under California law, and the lawyers' opinion was that regardless of Bibby's training at Duke University, the laws of California made no provision for the recognition of such a person performing any acts which might otherwise require licensure. They further noted that it did not matter if the acts were performed under the supervision of a physician and mentioned the famous *Magit* case as a clear indication of the attitude of California's courts.<sup>13</sup> Bibby was allowed only to perform physicals so he left the state to work as a PA in Arkansas.

While in California, Bibby met Jerry Bredouw, a freelance television producer, who had followed the trail. Bredouw was determined to use his contacts in the television industry to make the public aware of the need to train ex-military corpsmen to help physicians with their overwhelming workloads.<sup>14</sup> Bredouw wrote a script for a friend, Roy Huggins, who was the producer of a successful television series, *The Bold Ones*. The script was about an ex-military corpsman who moved to a rural community in California that had no doctor. The former corpsman began "taking care of people" and ultimately saved the

life of an automobile victim who was transported to an urban hospital by helicopter. Once the medical community discovered who the "doctor" was who stabilized the trauma victim, they had the ex-military corpsmen charged with practicing medicine without a license.

The episode, "People v. Chappman," aired on NBC on December 6, 1970, as part of the "lawyers" series of *The Bold Ones*. The episode depicted people from the rural community testifying on Chappman's behalf, underscoring their need for medical care. In the end, the defense lawyer, played by Burl Ives, asked the judge for an unusual ruling. He requested that Chappman be sentenced to attend a formal education program for PAs and once trained, return to the community to help meet their medical needs. In addition to the *Bold Ones* episode, Bredouw played an important role in convincing Dick Moores, the cartoonist for *Gasoline Alley*, to have one of the strip's lead characters become a PA. The character was Chipper Wallet, a former military corpsman in Viet Nam. Chip's adventures following his decision to apply and enroll in PA school began running in 180 US newspapers in March 1971.<sup>15</sup>

### **Development of California Legislation**

The direct effect of the *People v Whittaker* trial on the development of California legislation to allow physicians to use PAs is difficult to ascertain. The trial is referenced in several articles published at the time discussing how current licensure laws limited the innovation and use of new types of health professionals.<sup>16</sup> Stevenson recalled testifying at several medical and public hearings on PAs held in California while he was still appealing his case.<sup>8</sup> If nothing

else, the case renewed or sparked interest among California's health professional leaders and politicians in the need to address the growing demand for health care services.

A 25-member interdisciplinary California Health Manpower Council was established in 1967 to coordinate efforts to recruit and train personnel for health care. An editorial in *California Medicine* noted with pride that California was "first among the states to have under way a full scale engagement with the problems of health manpower shortage."<sup>17</sup> On March 26, 1968, Malcolm Todd, MD, president of the California Medical Association, told the CMA's house of delegates that it was time for them to establish a new "action program" to train physician's assistants "under the guidance of medical society sponsorship."<sup>18</sup> Todd would ascend to the presidency of the American Medical Association in 1974-75 and was a strong advocate for developing accreditation and national certification procedures for PAs nationally.

In 1968, the Santa Clara County Medical Society received a \$40,000 federal grant to evaluate, educate, and place "paramedical personnel" trained in the military into civilian health care jobs. The AMA Committee on Emerging Health Manpower and Physician's Assistants held a meeting in Los Angeles on May 21, 1969, and commended the local medical society for its efforts. However, the Santa Clara project ultimately failed to identify sufficient numbers of former service personnel to train and place into jobs.<sup>19</sup>

On April 2, 1970, a bill was introduced to the California Assembly to establish a PA certification process. That same month, a report of the Bureau of Research and Planning, California Medical Association, titled "Physician's Assistants," appeared in the associa-

tion's journal. The article described the training of PAs at Duke University, MEDEX at the University of Washington, and pediatric nurse practitioners at the University of Colorado. It also described the AMA's role in developing guidelines for the education of PAs. The report acknowledged that some nurses might feel threatened by the establishment of a new type of health professional, but pointed out that nurses are concerned more with direct patient care and are "most efficiently used as the physician's professional *associate*, rather than as his *assistant*."<sup>20</sup> The need to reassure nursing was evident and their inclusion in the process to develop the PA concept in California was essential. After being sent to committee, then revised and voted on by both the assembly and senate, the bill, AB 2109, was signed into law by Governor Ronald Reagan on September 17, 1970.<sup>2,3</sup>

The bill directed the California Board of Medical Examiners to establish a new category of health professional – the "physician's assistant." To "seek advice," the board held public hearings in San Francisco and in Los Angeles during the fall of 1971. The board made it clear that there would be no PAs in California until regulations had been established and approved and methods for training established. The board also declared that there would be no "grandfathering" of informally trained assistants. This upset a number of physicians who had hired ex-military corpsmen and were using them in their practices.

As mandated by the bill, the board appointed an Advisory Committee on Physician's Assistants Programs (ACPAP) that included a group of educators to delineate the PA concept in terms of educational requirements, supervision, duties, loci of work, and continuing education. In

her dissertation, Ver Stegg describes in detail the professional interplay that unfolded over the next year as the ACPAP gathered testimony and deliberated salient points offered by a vast array of interested parties. Mistakes were made in communications and rumors spread quickly, but overall the ACPAP made steady progress. They put forth a set of guidelines at the end of 1971 that all could accept, even if they did so with some reservations. The ACPAP later turned its attention to nurse practitioners. In August of 1972, the ACPAP changed its name to the Advisory Committee on Physician's Assistants and Nurse Practitioner Programs. The Committee completed its report to the Select Committee on Health Manpower on December 11, 1973.<sup>2,3</sup>

### RETROSPECTION

Under the right circumstances a singular event can tip the balance of conventional thinking and lead to the development of new initiatives. The use of ex-military corpsmen as a source of manpower and their training as PAs was a reasonable way to meet the growing needs for health manpower in California in the 1960s and 70s. Stevenson's use of Whittaker's past training and experience as a hospital corpsman was understandable given his situation in Redding. However, neither man envisioned or desired becoming the state's final "test case" to determine whether a physician could delegate tasks to an unlicensed subordinate.

In the end, many notable physicians rallied to Stevenson's defense, the trial caught national attention, and California's health care professionals and politicians were prompted to become one of the first states to "define" the PA profession. They did this through a committee mandated by the legislature and under the

direction of the California Board of Medical Examiners. Unlike North Carolina, where model legislation was developed by a small cadre of lawyers, educators, and health professionals, the California process was open to the public and by design included all stakeholders. All eyes were on California and they wanted to get it right. As one of the first states to enact legislation, they knew they were developing standards that other states would emulate. In retrospect, they did the state and nation a favor through their diligence and willingness to develop a process that could be evaluated and changed to allow PA's to expand their scope of practice over time.

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