HANDOUT FOR BJI TRAINING – APRIL 13, 2023
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EMERGING ISSUES IN FORENSIC EVIDENCE

This session will focus on the following:

1. Machine-generated proof: Machine-generated proof runs the gamut from Fitbit data to Google Earth to machine-learning algorithm conclusions that determine, with a given confidence level, who authored a text (like a tweet or a text message), to complex software that purports to interpret DNA mixtures and determine whether a suspect is a contributor.
   a. Questions for discussion:
      i. How should we categorize this kind of evidence? Is it the assertion of the programmer? Is the machine itself an accuser? Or is it more like physical evidence?
      ii. What rules of discovery and evidence govern this sort of evidence?
      iii. What legal challenges are judges likely to have to rule on?
      iv. What is the next wave of complexity (ChatGPT?) and how can the judiciary get ready for it?
   b. Material to review before the session if possible:
      i. FRE 801
      ii. FRCrimP 16
      iii. 6th Amendment Confrontation Clause
   c. Optional further reading:
      i. Alex Nunn, *Machine-Generated Evidence*, ABA Journal (2020) - https://www.americanbar.org/groups/science_technology/publications/scitech_lawyer/2020/summer/machinegenerated-evidence/ (summary of legal issues)
      ii. US v. Gissantaner (6th Cir. 2021) - https://casetext.com/case/united-states-v-gissantaner-1 (Daubert challenge to DNA software)
      iii. People v. Wakefield (N.Y. 2022) - https://law.justia.com/cases/new-york/court-of-appeals/2022/3.html (Frye and 6th Amendment challenge to DNA software)
      iv. State v. Pickett (N.J. 2021) - https://law.justia.com/cases/new-jersey/appellate-division-published/2021/a4207-19.html (Frye challenge to refusal to allow full access to DNA software source code)

2. "OSAC": Now that the National Commission on Forensic Science is gone, the main remaining federal group dedicated to improving forensic science is the National Institute of Standards and Technology (NIST)'s Organization of Scientific Area Committees (OSAC). OSAC is highly relevant to judges, but is not well known or understood.

a. Optional: Explore OSAC's website - https://www.nist.gov/organization-scientific-area-committees-forensic-science