A recent trip to Scotland gave me the opportunity to observe some elements of their criminal judicial system. While there are some similarities to the judicial system in South Carolina; there are some critical differences as well. Enumerated below is a "comparison/contrast" of the two systems.

1. Is the number of jurors empanelled to hear a criminal case the same in Scotland as in South Carolina?

ANSWER:
No. All criminal juries in Scotland are comprised of fifteen (15) members. All fifteen (15) members vote and all votes are equal towards the verdict of the case.

On the contrary, in South Carolina a criminal jury is composed of either six (6) or twelve (12) members. Six (6) members in either Magistrate or Municipal courts; and twelve (12) members for a General Sessions jury trial. As in Scotland, all jurors have an equal vote toward the verdict.

2. What are the different types of jury verdicts under both systems?

ANSWER:
In South Carolina there are only two types of verdicts in a criminal case: guilty or not guilty. A unanimous verdict or a unanimous vote is required before any verdict can be rendered. A "hung jury" or a "mistrial" occurs fairly often in South Carolina and in cases where a unanimous verdict by the jury cannot be reached. In other words, a single or steadfast vote for either guilty or not guilty will prevent a jury from rendering a unanimous verdict in South Carolina; and will result in a "mistrial". It is in the discretion of the judge to determine when and if to grant a mistrial. Most judges will allow a Magistrate or Municipal court jury to deliberate for two or three hours before strongly considering a motion for a mistrial. In a more serious charge in General Sessions Court, most judges will allow a jury one or even several days to deliberate before considering a motion for a mistrial from either side.

There are several significant differences between the South Carolina and Scottish system as to the requirements for a verdict; and the types:

1. A simple majority verdict is accepted in criminal cases in Scotland for jury verdicts. In other words, an 8-7 verdict is fine and is accepted by the court.
2. Because of the odd number of jurors and the simple majority verdict rule, there are no hung juries in Scotland.
3. Another significant difference is that there are **three** forms of verdicts in Scotland; and not two. In addition to "guilty" and "not guilty" there is a third verdict in Scotland in criminal cases called "not proven." The "not proven" verdict has the same legal effect as a "not guilty" verdict. The

historical jurisprudence of Scotland points to the following as the primary factor distinguishing between the "not guilty" and "not proven" verdicts: The "not guilty" verdict is thought to mean that the accused definitely did not commit the crime, and it is seen as a positive declaration by the jury of the defendant's innocence; whereas the verdict of "not proven" is generally characterized with the jury finding that the accused's guilt has not been conclusively demonstrated or conclusively proven. Research shows that around one-third of all Scottish jury acquittals are the product of the "not proven" verdict, while the same verdict is rendered around twenty (20) percent of the time in non-jury trials.

3. <u>What are the origins of the two systems</u>?

ANSWER:
The Scottish criminal jury trial system is believed to have derived from the Norman style of government which began to permeate Scotland around the 11th and 12th centuries, A.D. There is archeological evidence as to a form of community participation in different forums for resolving disputes. In the succeeding centuries of Scottish history, trial by jury became the most common method of settling conflicts (as opposed to trial by ordeal, trial by combat or trial by compurgation). While in the Fifteenth and Sixteenth centuries it is believed that jurors for trials were only seated because they had special knowledge of the case at issue; it was around the Nineteenth century where random jurors began to be sat solely in a judicial capacity.

The right to a jury trial in South Carolina has its primary roots and effect in the Sixth Amendment of the United States Constitution. This amendment, as part of the Bill of Rights, was enacted in 1787 and was binding on all states, including South Carolina. The amendment specifically states as follows: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, an to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

4. <u>Does every defendant in both jurisdictions have the absolute right to a jury trial</u>?

ANSWER:
No. In South Carolina, the right of a jury trial for an accused is pretty much absolute. The primary exception here would be in juvenile court; otherwise, whether or not the accused faces a maximum of thirty (30) days in jail (such as a DUI charge, criminal domestic violence, public disorderly conduct, etcetera) or faces life in prison the right to a jury trial is present.

In Scotland the right to a jury trial is much more narrow. Under "summary procedure" (or what South Carolina citizens would call or refer to as a bench trial), any offense where the maximum sentence is three (3) months in jail, or six (6) months in jail in the

case of a second or subsequent offense, is always conducted under summary or bench trial procedure. Critically, the overwhelming majority of magistrate type cases from South Carolina would be heard only by a judge and not by a jury.

The significantly more narrow right to a jury trial for a defendant in Scotland results in less than 100 jury trials per year being held in the entire country.

As noted above, a critical component of the right to a jury trial for a Scottish citizen is the type of offense charged. In "High Court" cases (very similar to our General Sessions court in South Carolina) - a defendant will receive a jury trial. As noted above, the jury will be comprised of fifteen (15) members and a simple majority verdict will suffice. All "High Court" trials are jury trials; however, the overwhelming majority of proceedings in either the Sheriff Courts or the Justice of the Peace Courts in Scotland are bench trials. Thus the jurisdiction of the offense charged is a critical component of whether or not a jury trial will ultimately be held.

Another significant difference between the South Carolina and Scottish systems is that it is the prosecutor in Scotland who decides whether or not a defendant will receive a jury trial. It is ultimately up to the Scottish prosecution authority - solely - to venue the charge against the defendant. Therefore, it is the prosecutor who decides whether or not a defendant will have the right to a jury trial. Of course, that is not the case in South Carolina as defendants usually have the same general right to a jury trial in either the lower or upper courts.

As noted above, Scotland's "High Court" has very similar jurisdictional powers as General Sessions court in South Carolina. It is where jury trials for serious offenses occur. It also serves as an appellate court for the two lower courts (Sheriff Courts and Justice of the Peace Courts). The Sheriff Courts and Justice of the Peace Courts bear a lot of resemblance to the South Carolina magistrate and municipal courts. While not exactly the same, the information noted in the preceding paragraph regarding the laws is generally correct.

5. Are there any differences between the prosecution offices in South Carolina and Scotland?

ANSWER:
Yes. In Scotland, the Public Prosecution Office is a very independent entity. It makes prosecution decisions completely independent of the wishes or views of the police department or the judiciary. In fact, Scotland's Public Prosecution Office prides itself on its independence and arms length from the other entities in the criminal justice system. In contrast, the circuit solicitor's office in South Carolina is generally seen as more of an extension of the police. The Solicitor's office will most likely work together and in concert with the investigating agency in South Carolina. The degree of independence shown from the Scotland angle is not present in South Carolina.

6. Does "Voir Dire" of the jury panel occur equally in South Carolina and Scotland?

ANSWER:
No. Another significant difference between the two systems is present here. In South Carolina, both the defense and the prosecution are allowed fairly wide latitude in submitting questions for the judge to ask of the panel as a whole. A typical example of this would be in a DUI/drunk driving case where South Carolina judges would ask, of the entire jury panel, the following: "Has any member of the jury panel ever contributed to or considered themselves a member of Mothers Against Drunk Driving?"; "Has any member of the jury panel ever had a close friend or family member hurt by someone convicted by drunk driving?" In South Carolina both the defense and the prosecution get a fair opportunity to submit similar type questions in the case for the judge to ask the panel as a whole in order to eliminate any bias or prejudiced jurors from the potential of being selected.

The Scottish system does not allow "voir dire" or the "voir dire" process. There is no provision for general questioning of this type by either the attorneys involved or the judge presiding at trial. Why? A hallmark of the Scottish system is the belief that the jury should be comprised of 15 random individuals from throughout different social strata and backgrounds of the community. Scottish jurisprudence frowns severely on any attempt to restrict or curtail this element. Scottish judicial history is full of examples where appellate opinions emphasize that a hallmark quality of Scottish criminal justice is a completely random jury picked from the community.

7. Do attorneys have a certain number of preemptory "strikes" that they can use during jury selection?

ANSWER:
Both systems have a significant difference here. In South Carolina, both the defense and prosecution are generally allowed the same number of "strikes" where they can basically strike a juror from service for any or no reason. Not so in Scotland. There are no preemptory challenges or strikes available to either attorney under the Scottish system. As stated above, the critical component here from the Scottish perspective is that it is highly disfavored for either attorney to be seen as trying to manipulate or control the composition of the jury. All players in the Scottish system embrace this concept. Consequently, any opportunity for either the court or the attorneys to try and shape or control the composition of the jury has been eliminated. Scottish judicial history illustrates that a primary factor of their jury system is the belief and the need for a completely random cross-section of the community for the most fair and just results to occur.

In contrast, South Carolina prosecutors and defense attorneys rarely select a jury where a substantial number of preemptory strikes are not used; and by both sides. The goal of getting a "friendly jury" is a significant component of jury selection in South Carolina.

Obviously - fundamental differences are present here.

8. <u>Are "opening statements" allowed in both jurisdictions</u>?

ANSWER:
No. In Scotland there are no opening statements by the attorneys - the jurors are simply read the indictment or charging document in its entirety. However, both the prosecutor and the defense attorney are allowed to make a closing statement or summation to the jury prior to deliberation in Scotland. Unlike South Carolina, the defendant always has the right to make the last argument to the jury before deliberation. In South Carolina the defendant loses this right if they put up evidence in their part of the case.

9. <u>Does a defendant have the right to appeal the "fairness" of the sentence imposed</u>?

ANSWER:
Not in South Carolina, but yes in Scotland. In Scotland a defendant can appeal the overall fairness of a sentence issued against them by a lower court judge. This procedure does not happen in South Carolina. As long as a judge sentences a defendant within the prescribed minimum and maximum, there is generally no appeal available to the defendant for an "unjust" sentence.

10. <u>What type of information must the defense disclose to the prosecution well in advance of trial in each system</u>?

ANSWER
In South Carolina a defendant would have to disclose any and all of the following information if they wanted to receive a copy of the prosecution's file in order to prepare for the case: Any papers, documents or photographs in the possession of the defendant <u>and</u> which the defendant intends to introduce as evidence at the trial; reports of any examinations or tests which the defendant intends to use as evidence; the specifics of any "alibi" defense and the specifics of any "insanity" defense.

In Scotland a defendant's duty to disclose is much more onerous and specific than in South Carolina. Very early on in the proceedings the defendant must "lodge a defense statement" with the court that is also furnished to the prosecutor. An accused must basically outline their defense to the court and the prosecutor well in advance of trial. Additionally, the defense attorney must immediately apprise in writing any material changes to a defense strategy well in advance of trial or a statement that there have been no changes to the initial defense statement lodged with the court. These documents must also be served upon any co-defendants. Under the Scottish rules of procedure a "defense statement" must set out - the nature of the defense, any matters of fact upon which the accused takes issue with the prosecution and any "point of law" that the defendant intends to rely upon to make their points to the court or the jury.

Full disclosure and not "catching someone by surprise" is a valued and integral part of the Scottish system. It is believed that the goal of getting the accused - and the community - a fair and just trial comprises full and advanced disclosure by both sides well in advance. Sanctions for failure to follow these rules are severe.

There is much more of an element of surprise in the South Carolina system. If a defense or prosecution item does not fall squarely within a category that requires advanced disclosure, then generally none is given. Summarily, a lot more "twists, turns and unpredictability" occurs in South Carolina trials than in Scotland.

11. Are the mental approaches the same for attorneys in South Carolina and Scotland?

ANSWER:
No. Attorneys in Scotland would most likely be seen as detached and distant from their clients by South Carolina citizens. And dispassionate. Although it is an attorney's job in both systems to attempt to have their client acquitted, Scottish attorneys are generally not as aggressive as American defense counsels. A Scottish barrister generally has an attitude of acceptance towards punishment applied to a client who is proven guilty, and many Americans would probably see these barristers as detached and uncommitted to the strident defense of their client.

In summary, the most prominent elements that both systems have in common \ would be as follows:

1. The right of a defendant to have an attorney;
2. The right to a jury trial when the defendant faces a significant charge;
3. Scotland's "High Court" and South Carolina's "General Sessions" court are where jury trials occur; and also serve as appellate courts for the lower courts beneath them;
4. The jury panel is taken randomly from the community where the defendant is charged;
5. The attorney for the defendant in both systems has the right to make a closing statement to the jury prior to deliberation;
6. Both systems require some level of disclosure from the defendant to the prosecution prior to trial;
7. Both systems allow for the court to end a jury trial in favor of the defendant on the basis of "insufficient evidence";
8. While the Scottish system is more liberal with the right to an appeal (an error of law or a harsh sentence), both systems guarantee a defendant this right (in South Carolina generally limited to an alleged "error of law").

Likewise, the most prominent elements that are different between the two systems would be as follows:

1. The much more liberal right to a jury trial in South Carolina versus Scotland;
2. The availability of the "not proven" verdict in Scotland;
3. The role of the prosecutor in deciding whether or not a defendant has a trial;

4. The provision for "voir dire" and "preemptory strikes" as it relates to jury selection in South Carolina; and its absence in Scotland;
5. No opening statements by the attorneys in Scotland;
6. In Scotland the defendant's attorney always has the right to make the last closing statement to the jury;
7. In Scotland the fairness of a sentence can be challenged;
8. South Carolina defendants are under much less of a burden to disclose information to the prosecution than in Scotland;