Hello Mr. Clark:

Thanks to you and the Committee for the opportunity to comment on the ABA's consideration of lifting its policy of requiring tenure at the nation's law schools as a prerequisite for accreditation. Personally, rather than a lifting the blanket rule, I would prefer that the general rule remain in place and the ABA adopt exceptions to the tenure system on a case by case basis. Such an approach would allow the ABA to monitor the potential impact of such a system upon the profession and upon diversity within the profession. In some geographical regions, there may be reasons for not having a tenure system and abandoning the system could advance the delivery of legal services generally. But in other regions, such a system would not work in students' favor or in the favor of the profession. I suspect that each situation will be quite different and given how long tenure has been around a more cautious approach makes sense.

So much focus has been placed on schools that would prefer no tenure system, I invite your attention to those that would maintain one in any event. The huge risk I see of the ABA adopting a blanket rule that abandons tenure as a prerequisite is that that policy will be seen as a tacit approval of an increase in contract level faculty at the nation's law schools that still maintain tenure. Aside from the clinical question, institutions could seek to hire more persons who are not tenured but not clinical but assign them to teach core courses, thus affording the tenured people less teaching responsibility and a greater focus upon scholarship. I personally think it terribly important that the tie between scholarship and teaching be maintained.

A related concern is that women and minorities will disproportionately fall into those hired as contractual professors -- and that is already the case. Belonging to the tenured ranks is a key power. Tenured professors can vote on matters that others cannot. They can serve on committees that control institutional policy and determine admissions. They are supported in scholarship and initiatives that in turn may affect legal outcomes. They decide what is taught in the classroom and what is not. The decision of who is tenured and who is not affects the delivery of justice in a profound way. Thus, if the ABA simply abandons tenure as a requirement for accreditation -- and a school maintains a two tiered system -- the ABA needs to be certain that that decision does not over time result in a decrease the number and percentages of women and minorities in tenured positions -- and indeed it needs to see to it that the percentages of women and minorities in the higher voting ranks continue to increase. Even a school that does not have tenure might still have a ranking system that would need to be unbiased.

I think many outsiders operate under the false assumption that law school faculties are diverse or that we operate like other entities. They are not and do not. When I graduated from law school and entered practice some 30 years ago the nation's top law firms were already hiring half of their associates as women. There are all sorts of reasons why partnership numbers are fewer, but women definitely were getting into the pipeline. Half of the students admitted in the nation's law schools are women. But I think that most of the nation's top law schools still haven't reached that status with respect to hiring of their untenured faculty. And when one looks
at diversity within rank the picture is even more disturbing. Unlike law firms, law schools cannot say that the nature of the job makes work/life balance difficult for women or minorities and that is why they are not there. As best I can tell over 20 years in teaching, most law schools pay very little attention to ensuring that their hiring, evaluative and promotional procedures for faculty are free of bias. Their hiring and evaluative procedures are loosey-goosey, and they see no need to do otherwise because, unlike other entities, they don't generally fear being sued over such procedures.

Minorities, and especially blacks, I believe, are less likely to enter the teaching profession if there is a two tiered system whereby one doesn't have a clear promise of a tenure vote. They would have legitimate concerns about the potential for "bait and switch," that is a person is hired tenure track, but later offered a contract position on the theory that they weren't good enough for tenure even as others with similar or less qualifications are promoted. Between such an option and law practice, law practice may make more sense in terms of security.

I continue to think that tenure does help protect those who have divergent viewpoints – including minorities and women. I am not certain our students value the extent to which that is true. But sadly it is also true that the hiring, tenure and promotion systems at many institutions already weeds out persons who would have different perspectives. The ABA needs to take care that it does not advance that weeding out process by now allowing institutions that have tenure systems to further degrade whatever security it offers to the disadvantage of minorities and women. Consequently, I would encourage the group to decide such matters on a school by school basis rather than in terms of broad policy applicable to everyone.

Thank you for the opportunity to comment.

W. Burlette Carter
Professor of Law
GW Law School