



## **Federal Judges Slam Alice At Event Honoring Judge Whyte**

By Dorothy Atkins

Law360, San Francisco (October 18, 2016, 9:49 PM EDT) -- Three federal judges from California and Delaware speaking Tuesday at a symposium to honor retiring U.S. District Judge Ronald Whyte criticized the U.S. Supreme Court's Alice ruling, saying it has spurred hundreds of patent invalidity motions in their districts, and its two-part test for analyzing patent validity is too subjective.

U.S. district judges Leonard P. Stark, Andrew J. Guilford and Cathy Ann Bencivengo said that there's been a rise in the number of patent invalidity motions in their districts since the Alice ruling came out in 2014 and that has slowed down pre-trial proceedings.

"I'm waiting for this trend to expire," Bencivengo said.

The two-prong test requires courts to determine whether a patent asserts an abstract idea under Section 101 of the Patent Act, and if so, whether it contains something "significantly more" — or an inventive concept — than the idea itself.

In Delaware, Judge Stark has more than 250 patent cases on his docket, he said. While the arguments in Alice motions have become shorter, the overall number of motions filed are increasing even more than when Alice first came out, Judge Stark said.

Bencivengo, who's from California's Southern District, said that the two-part test is broad and puts judges in the difficult position of determining on a case-by-case basis what is an abstract idea. Most of the patents named in the motions are related to computer technology and are not simple, she said.

“It’s not an enjoyable area,” she said.

California Central District’s Judge Guilford said he is trying to find a “higher level” of predictability when considering motions brought under Alice. So much of the two-step analysis is subjective and it can be frustrating, he said.

The judges' comments came as they sat on a panel before more than 200 academics, judges and attorneys during a symposium at Stanford University. The symposium was held to honor Judge Whyte, who will retire from presiding over the Northern District of California on Nov. 1. Judge Whyte has decided more than 7,000 civil cases and about 400 patent cases. In the process, Judge Whyte has helped create local standards for courts to review patent cases that other federal districts across the country have adopted.

According to Judge Stark, Judge Whyte once commented that there shouldn’t be a need for many patent trials and most should be decided in the motion for summary judgment phase. Judge Stark said he thought that it was a “deceptively simple” proposition, but one he frequently recalls as he’s reviewing hundreds of patent suits.