

(f) Upon motion of any party, the presiding officer may order witnesses excluded so that they cannot hear the testimony of the other witnesses. This rule does not authorize exclusion of:

- (1) A party who is an individual;
- (2) In the case of a party that is not an individual, an officer or employee of the party designated to be the party's sole representative for purposes of the hearing; or
- (3) An individual whose presence is shown by a party to be essential to the presentation of its case, including an individual employed by a party engaged in assisting counsel for the party.

(g) If a witness' testimony is submitted in writing prior to cross-examination, the cross-examining party need not subpoena the witness or pay for his or her travel to the hearing. The sponsoring party is responsible for producing the witness at its own expense, and failure to do so shall result in the striking of the witness' testimony.

#### **§ 17.39 Evidence.**

(a) The presiding officer shall determine the admissibility of evidence.

(b) Except as provided in this part, the presiding officer shall not be bound by the "Federal Rules of Evidence." However, the presiding officer may apply the "Federal Rules of Evidence" when appropriate, e.g., to exclude unreliable evidence.

(c) The presiding officer shall exclude evidence that is not relevant or material.

(d) Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or by considerations of undue delay or needless presentation of cumulative evidence.

(e) Relevant evidence may be excluded if it is privileged under Federal law.

(f) Evidence of furnishing or offering or promising to furnish, or accepting or offering or promising to accept, a valuable consideration in settling or attempting to settle a civil money penalty assessment which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the civil money penalty or its

amount. Evidence of conduct or statements made in settlement negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of settlement negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness or opposing a contention of undue delay.

(g) The presiding officer may in his or her discretion permit the parties to introduce rebuttal witnesses and evidence.

(h) All documents and other evidence offered or taken for the record shall be open to examination by all parties, unless otherwise ordered by the presiding officer pursuant to § 17.28.

#### **§ 17.41 The administrative record.**

(a) The hearing will be recorded and transcribed. Witnesses, participants, and counsel have 30 days from the time the transcript becomes available to propose corrections in the transcript of oral testimony. Corrections are permitted only for transcription errors. The presiding officer shall promptly order justified corrections. Transcripts may be obtained following the hearing from the Dockets Management Branch at a cost not to exceed the actual cost of duplication.

(b) The transcript of testimony, exhibits, and other evidence admitted at the hearing and all papers and requests filed in the proceeding constitute the administrative record for the decision by the presiding officer and the entity designated by the Commissioner of Food and Drugs to decide the appeal, currently the DAB.

(c) The administrative record may be inspected and copied (upon payment of a reasonable fee) by anyone unless otherwise ordered by the presiding officer, who shall upon motion of any party order otherwise when necessary to protect trade secrets or confidential commercial information, as defined in § 20.61 of this chapter, information the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, or other information that would be withheld from public disclosure under part 20.