SETTING UP YOUR EMERGENCY DEPARTMENT PROCESSES TO SUCCESSFULLY NAVIGATE EMTALA

Wisconsin Hospital Association

June 20, 2024

Quarles

KEY EMTALA DEVELOPMENTS

Quarles

CMS Gets Real With EMTALA In 2024

- CMS launched a significant educational initiative given the huge staffing challenges.
- New resources making it easy for patients to report.
- Education to patients: **You have these protections:**
  1. An appropriate medical screening exam to check for an **emergency medical condition**, and if you have one,
  2. Treatment until your emergency medical condition is stabilized, or
  3. An appropriate transfer to another hospital if you need it.

Educating Patients About Reporting EMTALA Violations (1)

- **Federal laws help protect you from unfair treatment and discrimination.**
- **Have you been denied treatment to stabilize your emergency medical condition in a hospital emergency department?**
- In addition to EMTALA, other federal laws help protect you from unfair treatment and discrimination. You can file a civil rights complaint with the Department of Health and Human Services if the discrimination happened in the past 6 months.

Quarles

Educating Patients About Reporting EMTALA Violations (2)

- Because of EMTALA, you can't be denied a medical screening exam or treatment for an emergency medical condition based on:
  - If you have health insurance or not
  - If you can pay for treatment
  - Your race, color, national origin, sex, religion, disability, or age
  - If you aren't a U.S. citizen
- Learn how to file an EMTALA complaint.
- **Have you experienced unfair treatment or discrimination in a non-emergency health care setting?**

Quarles

US v. Moyle (Idaho EMTALA Case Before US Supreme Court)

- Dobbs case overturned Roe v. Wade in 2022.
- United States filed lawsuit saying under the US Constitution supremacy clause, EMTALA allows hospitals to do abortions as stabilizing treatment (overruling the Idaho ban on abortion – the "Defense of Life Act").
- Idaho district court agreed – enjoined the Defense of Life Act from taking effect because it is impossible to follow both EMTALA and Defense of Life Act.
- The Idaho legislature appealed to a three judge panel which in September 2023 granted a stay of the Idaho district court's decision pending appeal, allowing the Defense of Life Act to go forward in the interim.
- The Ninth Circuit granted a rehearing and in November 2023 reversed the stay, meaning the Defense of Life Act could NOT go forward in the interim.
- Idaho legislature appealed to the Supreme Court which granted certiorari in January and held oral argument in April.

Quarles

CMS has cited two hospitals for failure to provide stabilizing treatment in the form of abortion.

- CMS cited a hospital in Missouri and a hospital in Kansas that they had not provided “necessary stabilizing care” required by EMTALA when they denied an abortion to Mylissa Farmer, whose water broke at 17 weeks’ gestation, less than halfway through the pregnancy.
- At each hospital, doctors told Ms. Farmer that the fetus would not survive because she had lost her amniotic fluid and that if her pregnancy wasn’t aborted, she could develop a severe infection and even lose her uterus. But because the fetus still had cardiac activity, the doctors would not abort the pregnancy.
- She ended up going to Illinois for the procedure. The National Women’s Law Center filed complaints with CMS which cited both hospitals, requiring a plan of correction.

Quarles

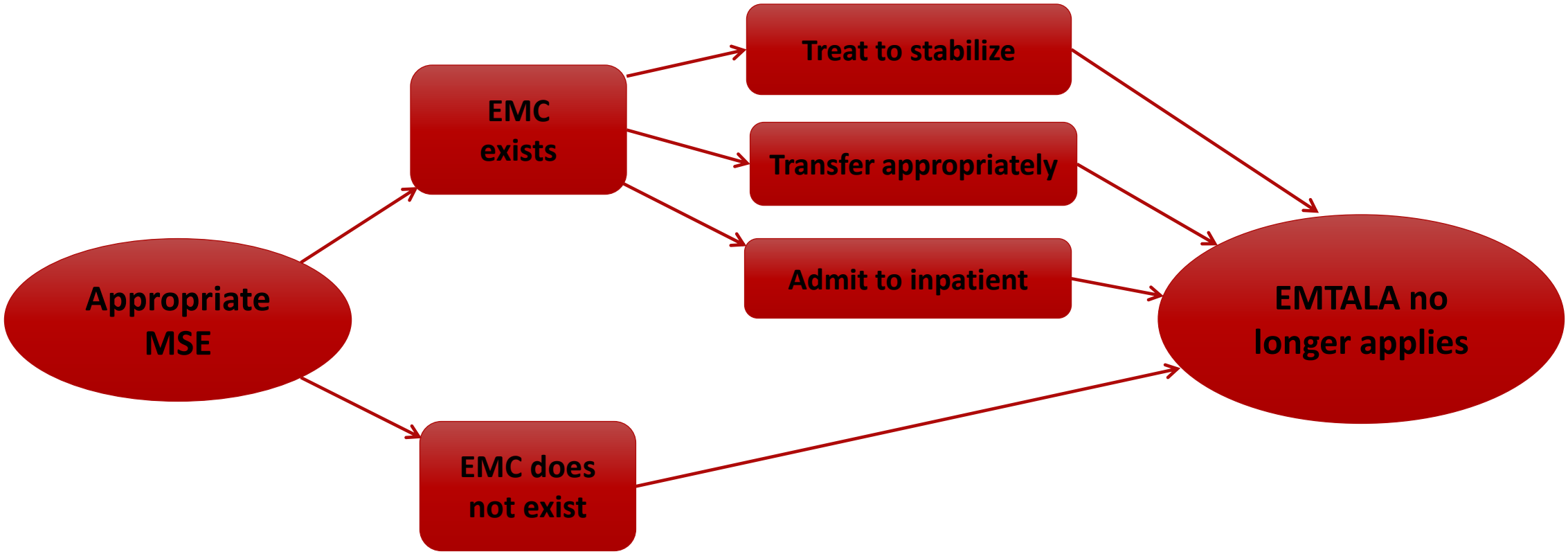
HOW EMTALA WORKS

Quarles & Brady LLP

The Basics Of EMTALA

- Any patient who “comes to the emergency department”
- Must be provided with an appropriate “medical screening examination” (MSE)
- To determine if the patient has an “emergency medical condition” (EMC)
  - If the patient has an EMC, then the hospital is obligated to either: (1) provide stabilizing treatment; (2) transfer the patient to another hospital in accordance with specified regulatory parameters.
- All (well most) of these terms have very specific definitions that matter!

EMTALA GRAPHIC



Quarles

Definition Of A DED

- Any department or facility of the hospital
- Regardless of whether it is located on or off the main hospital campus
- That meets at least one of 3 requirements:
  1. Licensed by the state as an emergency department
  2. Held out to the public as a place that provides care for emergent or urgent conditions
  3. At least one-third of outpatient visits are for emergent or urgent conditions without a scheduled appointment

Has The Patient "Come To" Hospital's Emergency Department?

- A person has "Come to the Emergency Department" if the person:
  1. Presents at a hospital Dedicated Emergency Department (DED) requesting evaluation or treatment (or it is requested on the person's behalf).
  2. Appears on hospital property and appearing to a prudent layperson to be in an emergency condition.
  3. Arrives on hospital property in a ground or air ambulance (there is a caveat …more later).

Quarles

Appearing On Hospital Property

- Entire main hospital campus, including the parking lot, sidewalk and driveway – generally within 250 yards of main building(s).
- If an off campus facility qualifies as a Dedicated Emergency Department (DED), this constitutes Hospital Property.
- Not medical office buildings, rural health clinics, nursing homes, or to patients being seen as outpatients.
- ....and the person ASKS for evaluation or treatment, or APPEARS EMERGENT, or is in an AMBULANCE.

What About Ambulances?

- **OFF HOSPITAL GROUNDS:** EMTALA applies to a patient in a ground or air ambulance owned and operated by the hospital even if the ambulance is not on hospital grounds.
- **ON HOSPITAL GROUNDS:** EMTALA applies to a patient in a ground or air ambulance NOT owned by the hospital if they present AT THE HOSPITAL DED.

Quarles

Required Medical Screening Exam (MSE)

- No prescribed legal definition – whatever is needed to determine whether there is an EMERGENCY MEDICAL CONDITION (EMC)
- By QUALIFIED MEDICAL PERSONNEL
- Must be sufficient to permit the hospital to decide whether or not the individual has an EMC
- Within the capability of the hospital's ED
  - Includes on-call physicians
  - Includes ancillary services routinely available to the ED
- The MSE must conform to the hospital's standard screening
  - All patients with similar symptoms get similar screening
  - Must follow hospital procedures/policies
- NO DELAY TO INQUIRE ABOUT PAYMENT!!!!

Emergency Medical Condition (EMC)

- Definition: A medical condition manifesting itself by acute symptoms of sufficient severity when absence of immediate medical attention could result in:
  - Placing health of a person or unborn child in serious jeopardy
  - Serious impairment to bodily function
  - Serious dysfunction of part of the body
  - Severe pain
  - Psych conditions count
- If no EMC exists, the hospital has no further legal obligation to treat under EMTALA.

Quarles

EMC And Pregnancy

- With respect to a pregnant woman who is having contractions, EMC exists when:
  - There is inadequate time to effect a safe transfer to another hospital before delivery, or
  - Transfer may pose a threat to the health or safety of the woman or unborn child.
- A pregnant woman who is not having contractions may still fall under general EMC definition.

Stabilizing Treatment

- The hospital is obligated to provide stabilizing treatment for EMCs (and women in labor) within the hospital's capability and capacity.
- "To stabilize" means:
  - To provide such medical treatment of the condition necessary to assure, within reasonable medical probability, that no material deterioration of the condition is likely to result from or occur during the transfer of the individual from the facility.
  - With respect to a pregnant woman having contractions with no time to safely transfer or where transfer threatens mom/child, means that the woman has delivered the child and the placenta.
- "Unstablized" means full EMTALA protections apply. It is determined from the medical record – WHICH MEANS SURVEYORS HAVE THE ADVANTAGE OF HINDSIGHT.
- Lesson: IF THE PATIENT IS MEDICALLY STABLE prior to transfer (not just clinically stable for transfer) DOCUMENT THAT SUPER CLEARLY IN THE RECORD.

Transfer Of An Unstable Patient In An EMC

- Permitted when:
  - Patient makes informed written request; OR
  - MD or QMP (if MD unavailable) signs certification that benefits GREATER THAN risks; AND
  - Transfer **meets four requirements of an appropriate transfer (next slide).**

Quarles

Four Requirements Of Appropriate Transfer

- It is acceptable to transfer a patient in an unstable EMC if it is an "appropriate" transfer.
- There are four requirements for an "appropriate" transfer:
  1. Transferring hospital must provide medical treatment within its capacity that minimizes the risks of transfer – "clinically stable for transfer" = ready to be moved.
  2. Receiving hospital must have a space/personnel for treatment, and must have agreed to accept the transfer – does not need to be an MD.
  3. Transferring hospital must send all medical records (or copies thereof) relating to the EMC that are available at the time of the transfer.
  4. Must use qualified personnel/appropriate equipment including life support for the transfer.

Recipient Hospital Obligations

- Hospitals with SPECIALIZED SERVICES (“such as a burn unit”) **must accept patients in transfer** from a hospital ED that does NOT have those services.
- Unless they lack CAPACITY – which means equipped beds and staffing.
- Or unless the patient is not “clinically stable for transfer” which is not defined in the regulations but just means ready to be moved.
- The recipient hospital CANNOT ask about insurance.

Do You Have Specialized Services?

- **Lower to Higher Level of Care:** A hospital must accept a transfer of a patient with an unstable EMC if the hospital has "specialized capabilities or facilities" (e.g., burn units, NICU, etc.) that are not available at the transferring hospital AND it has the capacity to treat the patient at the time of the request.
- **Lateral Transfers**: Strictly lateral transfers (that is, transfers between facilities of comparable resources and capabilities) are not required under EMTALA, UNLESS the transferring hospital has a serious capacity problem, a mechanical failure of equipment, power outages, or similar situations - and, even in such an instance, you as the accepting facility would still have to have the "capacity" to treat the patient (or at least have greater capacity than the transferring hospital).

Quarles

Reporting Other Hospitals

- A hospital receiving a patient in an unstable EMC from another hospital **has 72 hours to report** the transferring hospital if the patient arrived pursuant to a transfer that was not “appropriate”.
  - Most common example – patient arrived in a private car when patient's condition mandated an ambulance transfer.
  - If patient absolutely REFUSED the ambulance transfer, the "sending" hospital should discharge the patient and call the "receiving" hospital to alert them that this was not within the "sending" hospital's control.
- However, there are often missing facts – hospitals should call each other to figure out the full story before reporting.

Patient Refusal Of Transfer Or Treatment

- Try to get signed informed refusal from patient or representative (e.g., AMA form) or otherwise document it if patient refuses to sign.
- The patient's refusal to consent is effective only if the following three requirements are met:
  1. The patient has been informed of the risks and benefits of treatment/transfer (and this should be documented).
  2. The hospital takes all reasonable steps to secure the patient's written, signed informed refusal.
  3. The patient's refusal is documented in the record even if patient refuses to sign.

Maintaining A Central Log

- The hospital is required to maintain a central log for the DED in that facility and be able to pull it all together within thirty minutes if a surveyor asks
- The central log should include the individual's name and whether the individual:
  - Refused treatment or evaluation
  - Was treated/ stabilized
  - Was treated/ admitted
  - Was treated/ transferred

On-Call Physicians

- EMTALA requires hospitals to maintain a list of on-call physicians available to:
  - Provide further evaluation
  - Provide treatment necessary to stabilize
- On-call physicians must appear within a specified time to provide stabilizing treatment
- Not every specialty requires a physician on-call 24/7/365
- Non-physicians may support, but not REPLACE physicians on call.

EMTALA Enforcement

- CMS may bring administrative actions against hospital or physician
- Typically triggered by patient complaints or reports from other hospitals
- Failure to correct may (in egregious circumstances) result in Medicare termination and/or CMP penalties
- Individual Liability for On-Call Physicians
- Referral to QIO

TRICKY EMTALA ISSUES

Quarles

EMTALA Meets Mental Health

- Psychiatric conditions pose unique problems:
  - What is baseline vs. emergent
  - What is “stable”
- MSE should reflect evaluation for suicidal or homicidal thoughts, orientation, risk of assaultive behavior posing risk to self or others
- If chemical or physical restraints have been used, be careful about deeming a patient stable for discharge
- Consider initiating Emergency Detention

Emergency Detention Patients In Police Custody

- Police often bring patients for "medical clearance" on their way to an approved contracted facility
- These patients trigger EMTALA and an MSE is required (except legal blood draws)
- If EMC exists, stabilizing treatment or transfer is required (and if unstable, police vehicle is probably not appropriate).
- Police are not able to “consent” to treatment on the patient’s behalf

Intoxicated vs. Incapacitated By Alcohol

- **Intoxicated patients** are a challenge for emergency departments. High incidence of not wanting to stay and wanting to drive their car or otherwise endanger themselves. Limited detox beds.
- **Patients incapacitated by alcohol** may be taken into custody by police and brought to an inpatient treatment facility like Emergency Detention – often with medical clearance at the emergency department. Emergency department can also try to initiate this if patient arrives independently.
- **EMTALA TRIGGERED** by either scenario – whether or not in police custody – with the exception of "legal blood draws" (next slide).

What About Legal Blood Draws?

- If a person is brought to ED and law enforcement asks ED personnel to draw blood for a blood alcohol content test only and does not request examination or treatment and the person does not otherwise appear to need it, then no MSE is required.
- Apply prudent layperson standard.

EMTALA Enforcement

- CMS brings administrative actions against hospital or physician
- Typically triggered by patient complaints or reports from a hospital receiving a patient via inappropriate transfer
- Failure to correct could (in uncorrected egregious circumstances) result in Medicare participation termination
- Referral to Quality Improvement Organization (QIO) for an evaluation of safety issues, and a possible referral to OIG for penalties.

Quality Improvement Organization

- If CMS believes the alleged EMTALA violation rests wholly or in part on clinical aspects, CMS may involve the QIO
- QIO reviews the case (including survey findings and applicable plan(s) of correction) and meets with the hospital to discuss the incident
- Retroactive analysis – not concerned with what hospital has subsequently done to ensure compliance moving forward
- QIO ultimately issues report to OIG and may recommend that OIG impose penalties
- Separate from survey process

Capacity

- The capacity to render care is **not** reflected simply by:
  - The number of persons occupying a specialized unit,
  - The number of staff on duty, or
  - The amount of equipment on the hospital's premises.
- Capacity includes whatever a hospital customarily does to accommodate patients in excess of its occupancy limits.
- Customs matter: If the hospital usually moves patients to other units, calls in additional staff, borrows resources/ equipment from other facilities or otherwise regularly accommodates patients in a given way, that is part of the meaning of "capacity" for that hospital.
- "Specialized capacity" is what obligates certain hospitals to accept patients (in an unstable EMC) in transfer (Burn unit, NICU etc.).

Quarles

CMS: Why Do Hospitals Get Cited?

- Economic issues including insufficient staffing, expensive testing, lack of patient coverage.
- Insufficient knowledge of the law, especially among on call physicians (who may not know they are individually on the hook).
  - Does your staff understand the RECIPIENT hospital obligations?
  - Does your staff understand CAPACITY?
  - Does your staff understand HIGHER LEVEL OF CARE?
- Murky Situations – abortion as “stabilizing treatment,” psychiatric emergency medical conditions.
- Nowhere has “capacity” to accept patients = ER Boarding.
- Not wanting to turn in a referral source/ respected neighbor (despite obligation to report)

SCENARIOS

Quarles

Scenario 1:
Intoxicated Patient Wants To Leave

- A highly intoxicated patient voluntarily arrives at the ED with a profusely bleeding head wound. A QMP begins the MSE, but the patient suddenly changes his mind and wants to leave, and is observed heading to his car in the parking lot, apparently intending to drive it.
- **Question**: Does EMTALA apply and, if so, what does EMTALA require in this situation?
- **Question:** May hospital staff contact the police?

Quarles

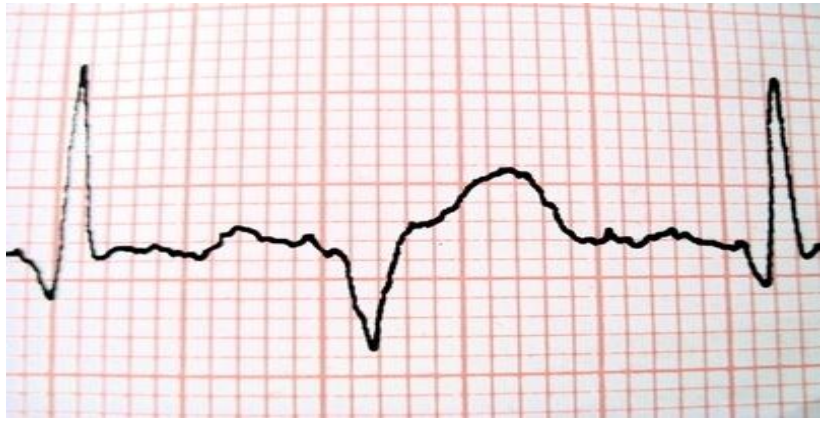
Scenario 2:
Mental Health Patient

- A person with a long history of mental health issues who frequently comes to the hospital for stabilization appears to be experiencing an acute psychiatric episode in the parking lot, acting very disruptive and loud and speaking nonsense.
  - **Question**: Is EMTALA triggered and why?
- Assume that the patient is evaluated, medicated, and now appears lucid. He states that he has no suicidal or homicidal thoughts and is planning to take his medications reliably. He is requesting to leave.
  - **Question**: What are the EMTALA obligations?

Quarles

Scenario 3:
Erratic Heartbeat

- A woman comes to the ED complaining of mild chest pain. An MSE is conducted and reveals an erratic heartbeat. She would like to go to a hospital closer to her home and would like to go in her own private car (her husband will drive).
- **Question**: Does EMTALA apply and, if so, what does EMTALA require in this situation?



Quarles

EMTALA FORMS AND FLOWCHARTS

Quarles

EMTALA TRANSFER FORM

IMPORTANT LEGAL NOTICE: Hospital is required by federal law to provide any presenting patient with a medical screening examination to determine whether an emergency medical condition exists and to provide necessary stabilizing treatment within its capabilities for emergency medical conditions without regard to means or ability to pay.

1. Reason for Transfer (*check one*):

☐ For equipment or services not available at Hospital (list):
_____;

OR

☐ Patient-initiated request for transfer after being informed of Hospital's capabilities and capacity as well as the risks and benefits of transfer.

2. Risks of Transfer:
Hospital has made best efforts to provide treatment to minimize the risks of transfer as much as possible. However, all transfers have inherent risks of delays or accidents in transit, pain or discomfort upon movement, and limited medical capacity of transport units that may limit available care in the event of a crisis. In addition, this patient's risks of transfer are as follows:

_____
_____

3. Benefits of Treatment at Receiving Facility:

_____
_____

4. Mode of Transport:
☐ Ground Ambulance
☐ Air Ambulance
Transport Service Name: _____

5. Receiving Facility Acceptance:
Name of Receiving Facility: _____
Accepting Individual: _____
Time of Contact: _____
Time of Actual Transfer:_____

6. Records Sent:
☐ ED/ UC Record
☐ Lab
☐ EKG
☐ Images
☐ Imaging Reports
☐ Cath CD
☐ Ultrasound
☐ H & P
☐ Consults Advance Directives
☐ Discharge Summary
☐ Med List/ Reconciliation
☐ Pre-hospital Ambulance Record
☐ Other: _____

7. **Physician Certification:** *(NOT required if patient requests transfer)*
Based upon my examination of the patient and the information available to me at the time of transfer as summarized above (and if appropriate MD consultation), I certify that the risks of transfer are outweighed by the benefits reasonably anticipated from proper care at the receiving facility.

QMP SIGNATURE ***DATE/TIME***

PHYSICIAN COUNTERSIGNATURE ***DATE/TIME***
(only if QMP is not a physician, physician is unavailable at the time of transfer, and QMP has obtained physician's agreement through consultation prior to certification)

- -

PATIENT TO COMPLETE

☐ **Consents to Transfer**
I hereby consent to transfer to another medical facility. I understand that it is the opinion of the physician and/or other practitioner responsible for my care that the benefits of treatment there outweigh the risks of transfer, and I am aware of those risks and benefits (as described in this form).

OR

☐ **Requests Transfer**
After considering the medical information provided to me, including risks of transfer and benefits of treatment elsewhere, summarized herein, I hereby request that I be transferred to another medical facility. The reason(s) for my request are as follows:

____

____

OR

☐ **Refuses Transfer**
After considering the risks of transfer and benefits of treatment elsewhere (as described in this form), and after being informed that the physician or other practitioner overseeing my care recommends transfer, I hereby refuse to allow such transfer and choose to receive my treatment here. The physician overseeing my care or other practitioner has informed me of the risks associated with my refusal, and I understand and accept those risks. I understand that I am making this decision against medical advice and I hereby release the hospital and the treating physician and/or other practitioner and their respective representatives of and from all responsibility or liability in the event that my refusal to consent to the recommended transfer proves detrimental to my life, health, or recovery. The reason(s) for my refusal are as follows:

____

____

SIGNATURE OF PATIENT OR RESPONSIBLE PERSON ***DATE & TIME***

WITNESS ***DATE & TIME***

Patient Sticker ID or
Name _____
DOB _____
MR # _____
Date _____

MEDICAL SCREENING EXAMINATION FORM

Patient Name: _____ **Date of Birth:** _____

Date: _____ **Time:** _____

EXAMINATION	
CHIEF COMPLAINT:	
PERTINENT HISTORY:	
PHYSICAL EXAMINATION:	
VITALS:	
• TEMPERATURE:	
• BLOOD PRESSURE:	
• PULSE:	
• RATE OF RESPIRATION:	
• OXYGEN SATURATION:	
CRITICAL MEDICATIONS RELATED TO CONDITION (e.g., Insulin, ASA):	
ALLERGIES:	

EMERGECY MEDICAL CONDITION DETERMINATION		
DOES AN EMERGENCY MEDICAL CONDITION EXIST?	☐ YES ☐ NO	
PRIORITY LEVEL:	☐	RED Respirations - Over 30 Perfusion - Cap refill over 2 seconds Mental Status - Unable to follow simple commands
	☐	YELLOW Stable - Potential change
	☐	GREEN Stable - No change
OTHER RELEVANT NOTES:		
CHANGE OF CONDITION:	☐	RED
Time:	☐	YELLOW Stable - Potential change

EXAMINATION	
OTHER DIAGNOSTIC STUDIES:	
ON CALL PHYSICIAN CONTACTED?	☐ YES ☐ NO
LAB TESTS:	

PHYSICIAN OR OTHER QUALIFED MEDICAL PERSONNEL SIGNATURE:

_____

PATIENT'S INFORMED REFUSAL OF EXAMINATION/TREATMENT

PATIENT NAME: _____

MEDICAL SCREENING EXAMINATION

I understand that the Hospital is required by law to provide me with a medical screening examination without regard to my ability to pay for these services or my insurance status. This has been explained to me, and I understand the risks and benefits of my decision to refuse all or part of a medical screening examination. As indicated below, I hereby decline all or part of the medical screening examination that has been recommended. I understand the purpose of the medical screening examination is to identify whether I have an emergency medical condition, and that by declining I may be putting myself at increased risk for further illness, injury, permanent disability, or death.

☐ **Refusal of Medical Screening Examination.**

OR

☐ **Refusal of Only the Following Portion(s) of the Medical Screening Examination:**

_____

_____

STABILIZING TREATMENT

As indicated below, I refuse to consent to some or all stabilizing treatment as explained and listed by the physician: _____. The medical benefit of the stabilizing treatment has been explained to me as well as the risks for refusing such treatment. Specifically, I understand that my refusal of stabilizing treatment may result in further illness, injury, permanent disability, or death.

☐ **Refusal of Stabilizing Treatment.**

OR

☐ **Refusal of Only the Following Stabilizing Treatment:**

_____

_____

LEAVING AGAINST MEDICAL ADVICE

☐ I am leaving this facility even though further tests and/or treatment are recommended. The medical benefits of staying and receiving treatment, as well as the alternatives to such treatment, have been explained to me and I understand them. I also understand that my leaving may result in further illness, injury, permanent disability or death.

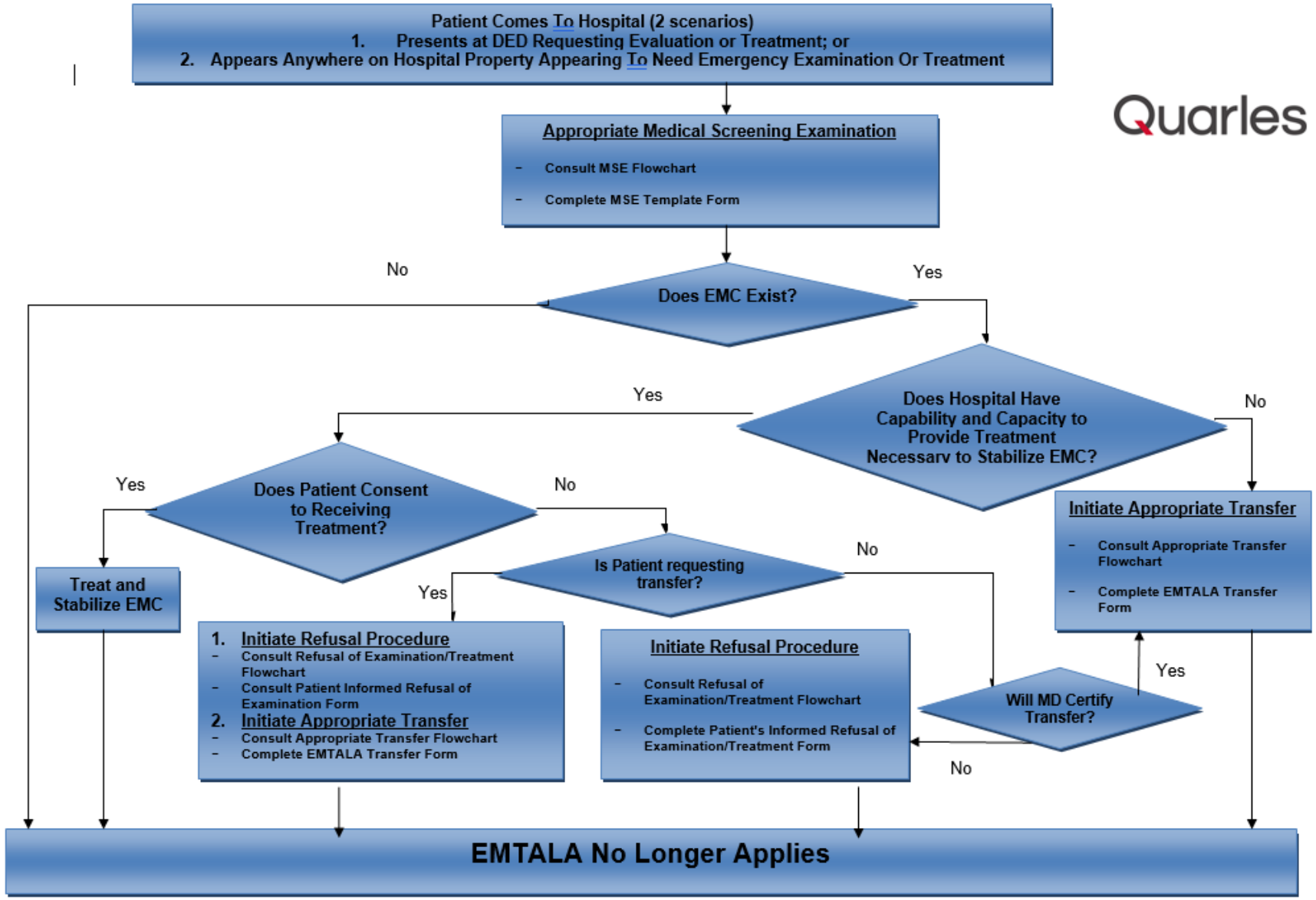
I have had an opportunity to ask questions and my questions have been thoroughly answered. I understand that my refusal of services may result in a worsening of my condition and could seriously or permanently impair my bodily function, endanger my health, and even my life. I understand I may change my mind at any time and request the care I am now refusing be administered if still appropriate at this Hospital or any other Hospital I choose. My signature below indicates that I have made this decision freely and of my own accord.

I hereby release Hospital, its employees and officers, and my attending physician from all liability for any adverse results caused by my refusal of examination or treatment, or by my departure from the Hospital against medical advice.

_____	_____
Signature of Patient or Patient Representative	Date
_____	_____
(Relationship to Patient)	Date
_____	_____
Witness	Date
_____	_____
Witness	Date

NOTE:
* If the patient refuses to complete or sign any portion, please: (1) indicate "Signature Refused" signed by two witnesses to the refusal; and (2) place this form in the patient's chart and document all efforts made to secure the patient's signature in the progress notes portion of the medical record.

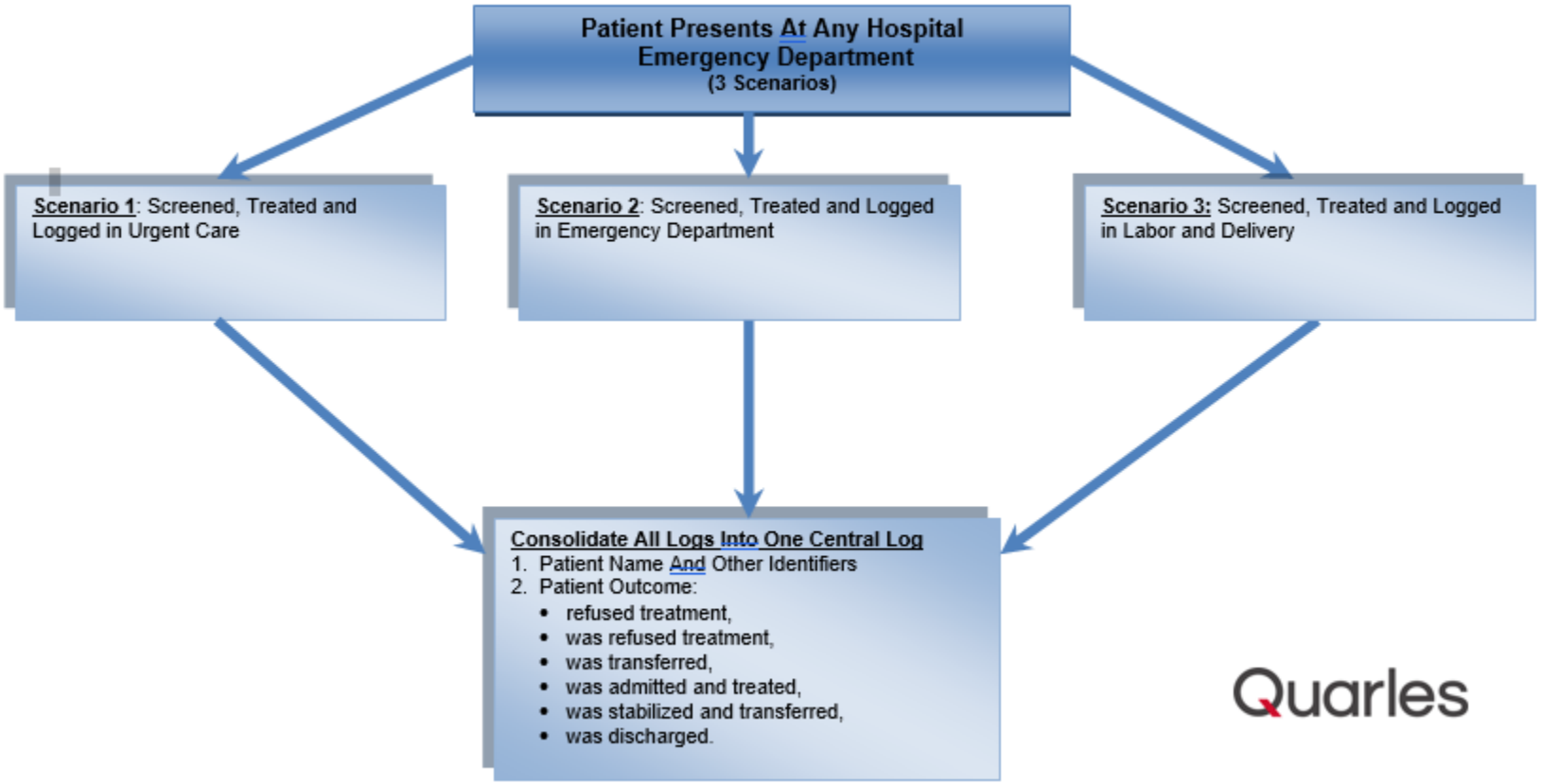
EMTALA OVERVIEW CHART



Quarles

Quarles

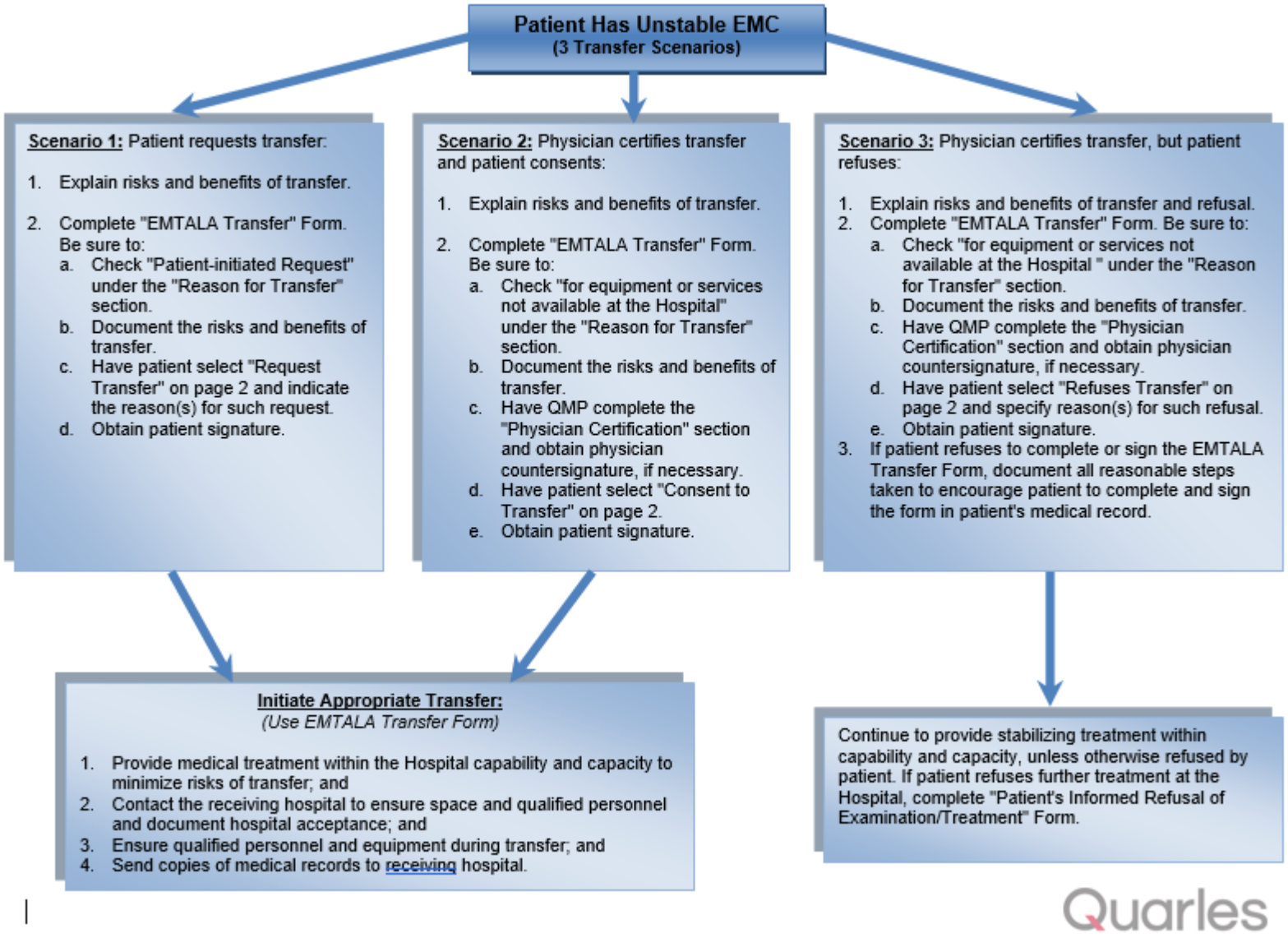
Central Log Flowchart



Quarles

Quarles

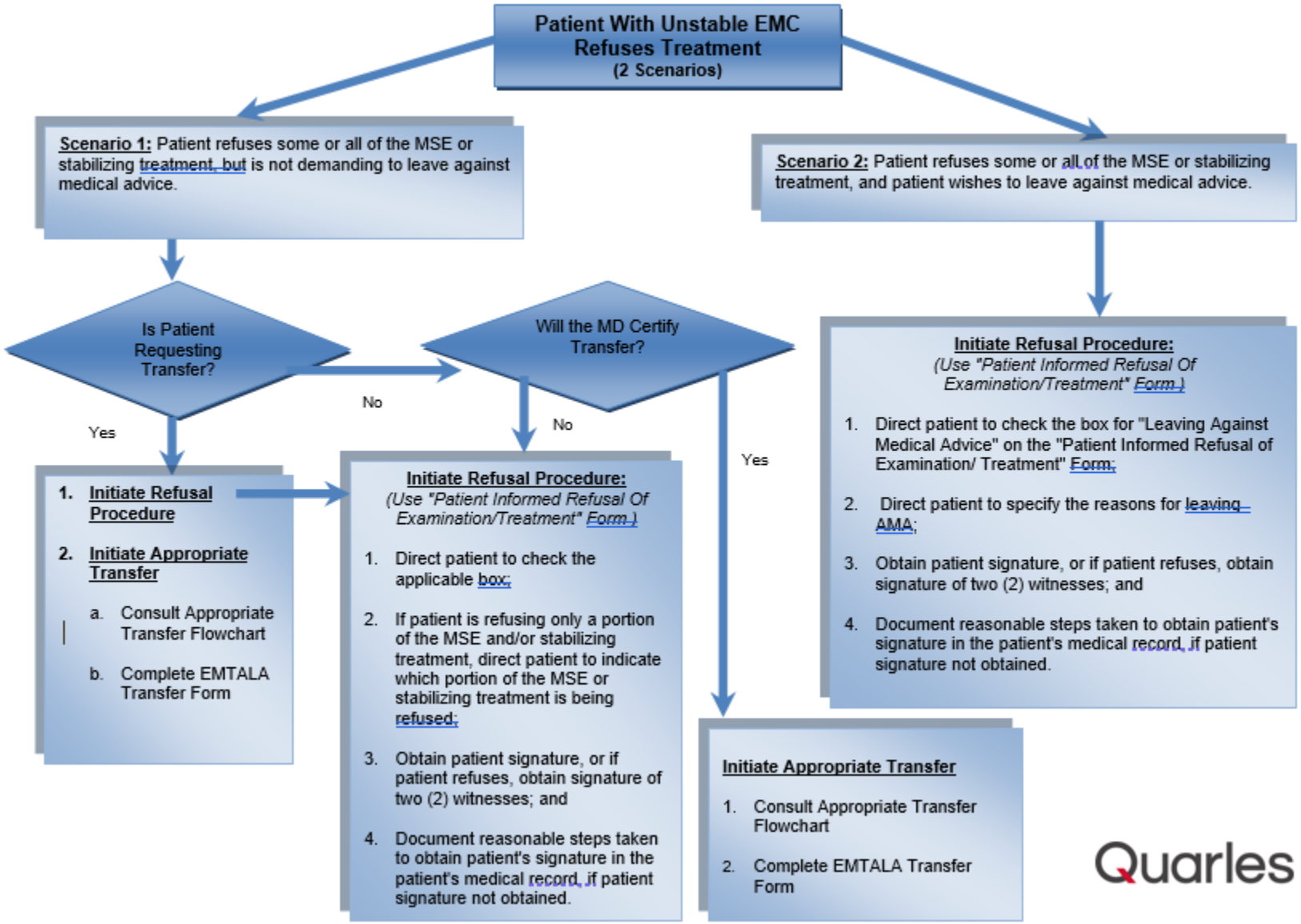
Appropriate Transfer Flowchart



Quarles

Quarles

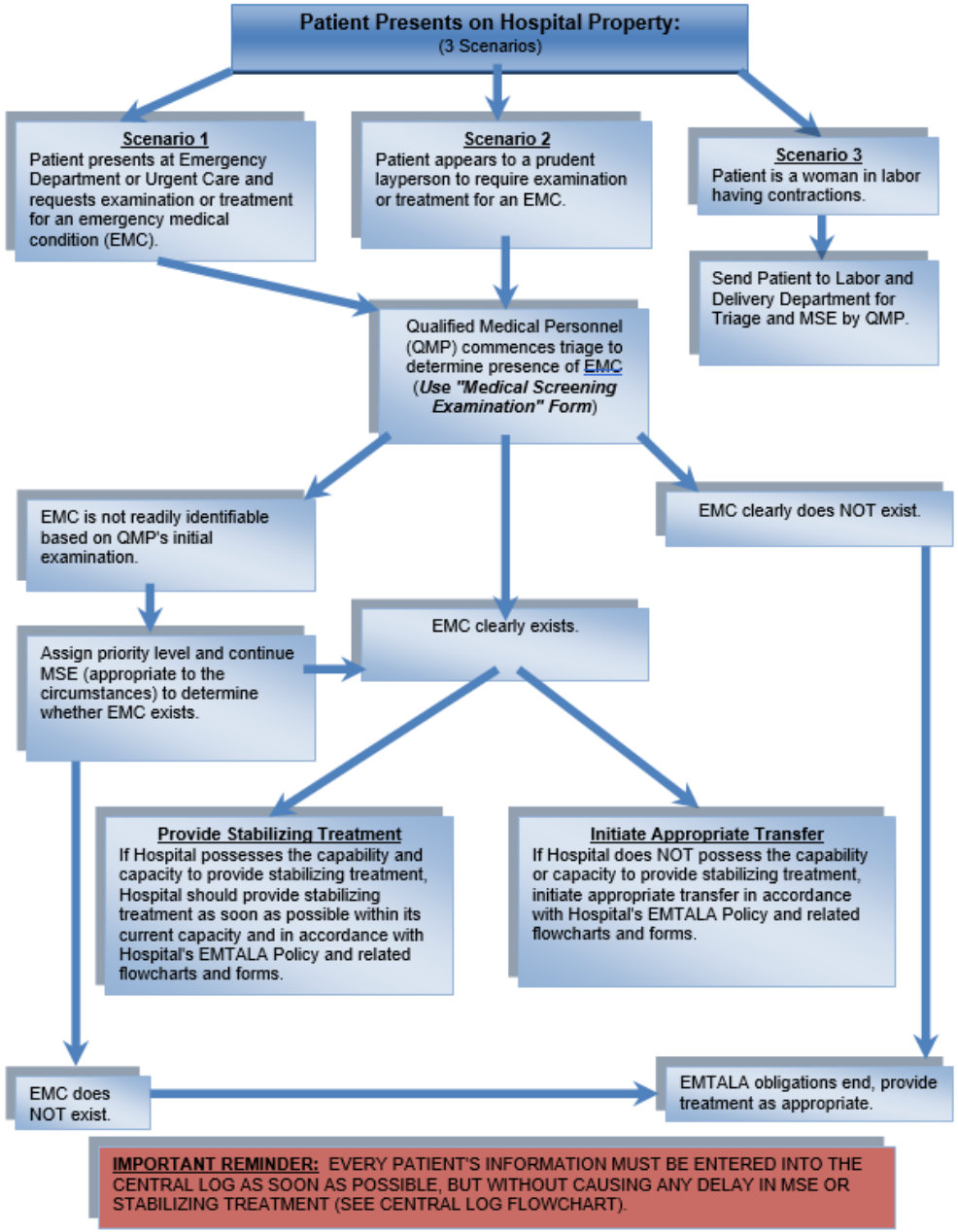
Refusal of Examination/Treatment Flowchart



Quarles

Quarles

MEDICAL SCREENING EXAMINATION (MSE) FLOWCHART



Any Questions?

Sarah Coyne
(608) 283-2435
Sarah.Coyne@quarles.com

Jon Kammerzelt
(608) 283-2438
Jon.Kammerzelt@quarles.com

Quarles