

MACM[®]

RISK MANAGER

Summer 2017



PHYSICIAN BURNOUT:

Signs & Symptoms

Medical Assurance Company of Mississippi



Maryann Wee Has Retired!

After 28 years with MACM, Maryann Wee retired in April 2017.

We could not pass up this opportunity to acknowledge the impact she has had on the Risk Management Department and our insureds. After all, Maryann founded the Loss Prevention Department – the predecessor to today’s Risk Management Department – and saw many changes in medicine and the delivery of healthcare during her years working with and for Mississippi physicians.

So many of our insureds and their clinic staff had the opportunity to work with

Maryann and benefited from her vast risk management experience. She built strong and lasting relationships with our physicians, their clinic managers, and staff.

We in Risk Management owe Maryann a debt of gratitude both professionally and personally. She trained and taught each one of us from her years of experience. She modeled professionalism and a strong work ethic. She repeatedly adapted her risk management approach through the years to address new and evolving issues and concerns of our insureds.

Those of you who knew Maryann know she worked diligently for our insured physicians and clinics. Being the wife of a physician herself, Maryann was

keenly aware of the added stresses physicians have faced in recent years and, therefore, looked for ways the Risk Management Department could better serve our insureds.

Indeed, Maryann Wee built a legacy at MACM. And, we in the Risk Management Department will strive to carry on that legacy in the years to come by continuing to be a trusted resource for our physicians and their staff.

We wish her nothing but the best in her retirement years (and hope she will return to Mississippi to visit us)! Good Luck, Maryann! Enjoy your much deserved retirement!

From the Cover

In survey after survey, physicians regularly admit to experiencing at least one symptom of burnout. In this issue of the Risk Manager, MACM Medical Director, Gerry Ann Houston, MD, offers her thoughts on physician burnout - the symptoms and the concerns - and how it can affect a physician's liability risk.

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Kathy Stone, BSN, RN, Named as VP of Risk Management

As someone who enjoys working with and analyzing data, Kathy Stone plans to use this interest for the benefit of MACM insureds. As the new Vice President of Risk Management, she plans to increase the department's use of data to analyze claims trends and identify areas of need, while still emphasizing attention to detail.

“One of my passions is data analysis. I want to fine tune our claims data and our ability to use it, so that we can clearly identify areas of need,” Kathy said. “Once those needs are identified, we can develop educational efforts and interventions around those issues or concerns identified via data.”

Accessibility to the Risk Management resources will continue to be a priority, and insureds will know that if the MACM office is open, there will be a

Risk Management Consultant available to answer questions or offer advice. In addition to the availability in-house, Kathy's plans include seeking opportunities for the Risk Management Staff to interact more often with MACM insureds and their clinic staff.

Kathy's clinical experience includes ICU Nursing and infusion therapy for oncology, infectious disease, and pain management. Her background also includes ICD-9 auditing for a major insurance company, claims analysis for a Medicare Program Integrity Unit, and research and medical evaluation for a large defense law firm. She joined MACM in November 2002.

“I think everyone at MACM wants to be a strong support system for our insureds,” Kathy said. “This doesn't start or stop with a claim or a lawsuit. The Risk Management Department is always striving to determine our insureds' greatest needs and the best methods to meet those needs.”



CYBER LIABILITY

The Ugly Truth and How We Can Help

By Kathy Stone, BSN, RN, Vice President of Risk Management

You may be asking what MACM knows about cyber liability and wondering why you have seen so much from us recently on this subject. Unfortunately, we have learned a lot about this topic as cyber attacks and privacy breaches have become a greater concern in the practice of medicine these days.

Experts now believe everyone will be hacked at some point. It is just a matter of when. And, since healthcare entities tend to store much richer data than others, the information you gather daily on your patient population is extremely valuable on the black market. For example, a social security number is worth \$15, but a medical record – with all of the demographic and medical data – will sell for \$60 each. Multiply that by the number of patient records you keep and realize the value you possess.

In our continuing effort to be a resource for you, our insureds, and to provide risk management guidance and tools for your use, we recently developed a live educational program on cyber liability. We presented this program – *Risks and Resources: 2017 Cyber Liability Update* – in Hattiesburg, Jackson, Biloxi, and Oxford during March, April, and May, with the purpose of educating our insureds and highlighting the issue of cyber attacks and privacy breaches. These presentations have just concluded, but we hope to produce a webinar version that will be available through the MACM website. We will notify you when that program is posted online and encourage you to take the time to review it.

So, why does MACM care about an IT issue like cyber liability? After all, it is not a clinical, risk management, or claims concern. Or, is it?

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How can you minimize the liability risk should a cyber attack or breach occur? Consider the following:

1. Educate your staff on the following:
 - the prevalence and danger of breaches
 - what to be on the lookout for to avoid falling victim to phishing or ransomware
 - clinic policy regarding use of email, texts, etc., and any other devices connected to the EMR/clinic computers
2. Encrypt your data, especially when transferring electronically.
3. Limit access to only those who really need it.
4. Get the best you can afford in
 - Firewalls
 - Intrusion detection
 - Anti-virus/anti-malware
5. Audit and test your security periodically.
6. Backup your data frequently, routinely, and consistently, *i.e.* set a tight schedule and stick with it.
7. Update your software whenever updates become available.
8. Turn off any function that is not being used.
9. Turn Wi-Fi off when not in use (for example: weekends, holidays).
10. Have a plan on how to continue to care for patients should an attack occur, especially if it results in preventing access to patient records.



PHYSICIAN BURNOUT:

How it Affects You and How Can MACM Help

By Gerry Ann Houston, MD, Medical Director

Physician “burnout” seems to be the new buzzword in the medical literature and has even been called an epidemic. But what exactly is burnout? It is defined as a syndrome characterized by a loss of enthusiasm for work (emotional exhaustion), development of cynicism/ depersonalization (feeling detached or insensitive), and a low sense of personal accomplishment. The results of the first national study on physician burnout were published in the *Archives of Internal Medicine* in 2012. At that time 48.5 percent of physicians reported at least one symptom of burnout.¹ Since then, the number has increased, with a more recent study quoting over 86 percent of U.S. physicians being moderately to severely stressed or burned out on an average day.²

Burnout is on the rise. The graph from Mayo Clinic Proceedings shows the

burnout rate by specialty for years 2011 and 2014. Dermatology and Urology had the greatest increase during the time period, though there were multiple specialties with more than a 10 percent increase.

The reasons a physician develops burnout are multiple and different for each physician according to age, specialty, practice type, and location. Some causes are professional and due to things such as long working hours, frustrations associated with an EMR, changes in reimbursement, unreasonable patient expectations, and fear of a malpractice claim. And, on top of these issues are personal ones that include financial worries, limited quality time with family, and lack of time away from work. Burnout in physicians is associated with an increase in alcohol use, broken relationships, suicidal ideation, and

early retirement. The consequences of stress lead to an increase in medical errors, poor patient care, low patient satisfaction and, thus, the potential for a medical malpractice claim. It is not surprising that the recognition of burnout and its effect on patient care has gotten the attention of plaintiff attorneys who are now addressing this on their websites in order to entice more clients.

What can be done to prevent burnout or to deal with its consequences once it develops? Physicians are being urged to decrease their workload, spend more time with family, get adequate sleep and exercise, develop time management skills, and seek advice on managing finances. In some parts of the country, physician wellness programs are being started at universities and hospitals, teaching burned out physicians to develop such skills as resiliency.

cy and mindful self-awareness. These programs are helping physicians to improve their personal well-being with a decrease in burnout and improvement in mood disturbances. The hope is that this in turn will improve patient care, reduce medical errors, and lower the risk of a malpractice claim.

All of these measures seem like appropriate means to help prevent and treat burnout, but can physicians actually do these things? The healthcare environment is such that physicians are expected to take care of everyone else, and many times, it is to the detriment of their own physical and emotional well-being. Physicians first have to recognize that they are not invincible and may be experiencing burnout; they then must take the necessary steps to recover.

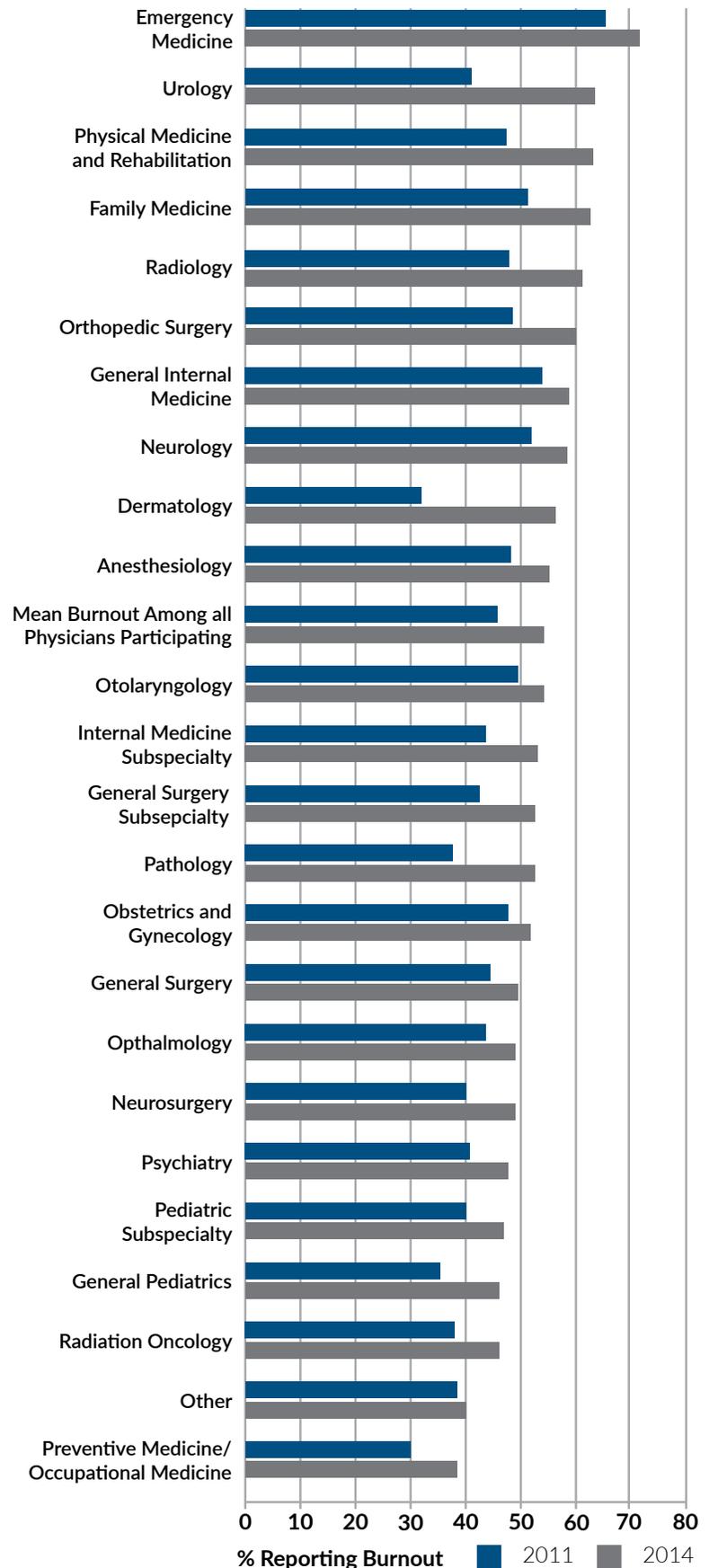
With the potential of medical malpractice claims rising with the increase in physician burnout, the medical professional liability insurance industry has a stake in helping physicians deal with this. We need to foster healthy and happy physicians so that our patients are healthy and happy.

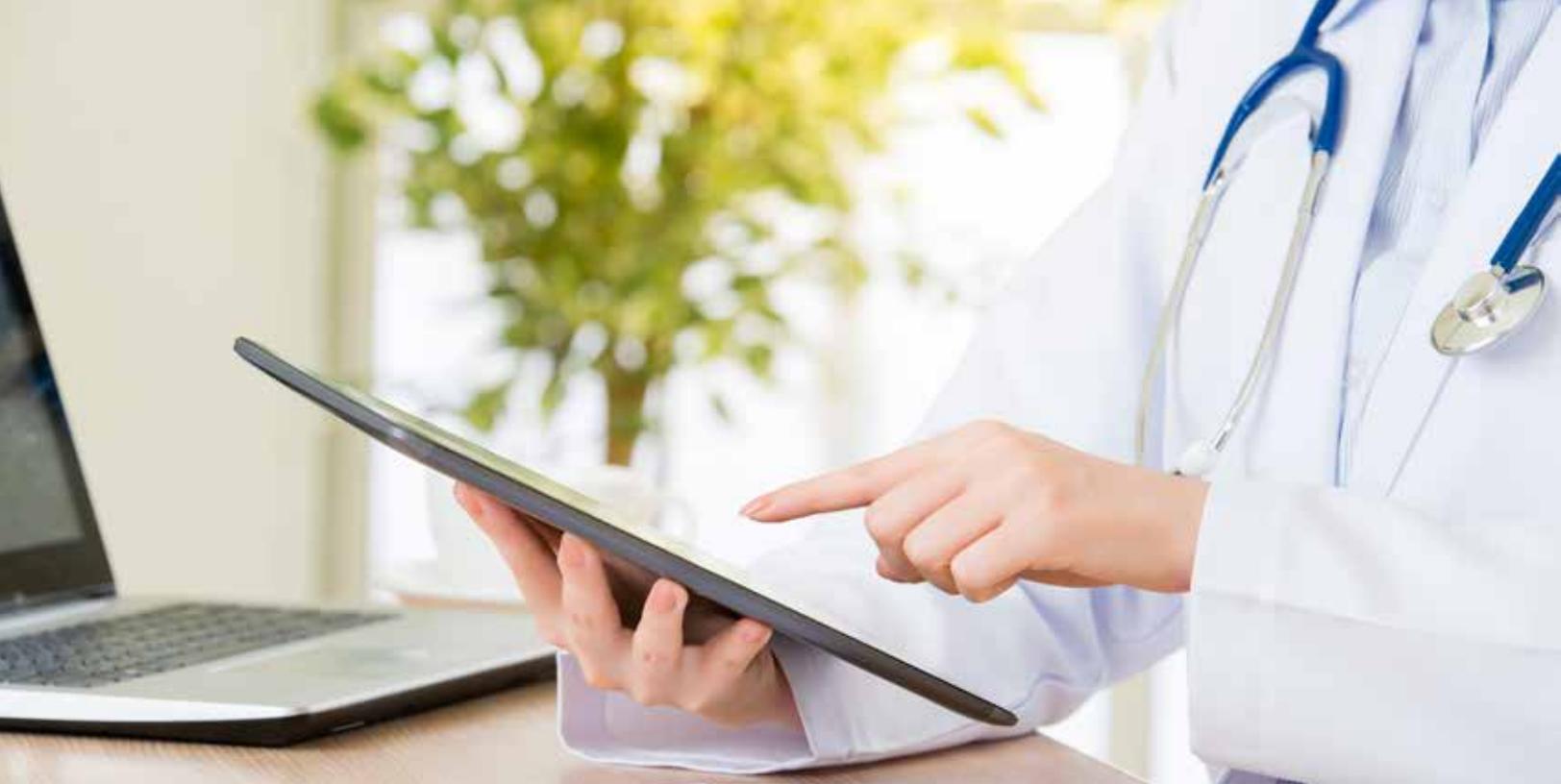
What can we at MACM do to help educate physicians on how to recognize burnout? And what can we do to help physicians recover once they find they are part of this new epidemic? Let us know what you need. This is your company, and we are interested most in helping you.

Footnotes:

1. Shanafelt T, et al. Burnout and satisfaction with work-life balance among U.S. physicians relative to the general U.S. population. *Arch Intern Med.* 2012; 172 (18):1377-1385.
2. VITAL WorkLife & Cejika Search, 2015 Physician Stress and Burnout Survey.

BURNOUT RATES BY SPECIALTY





PRODUCTION POINTERS:

When and How to Produce Medical Records

By Stephanie Edgar, JD, General Counsel

We get numerous questions about the propriety of producing medical records to patients' loved ones or to lawyers. Therefore, this article is intended to give broad guidance on when and under what circumstances it is appropriate to produce medical records. Of course, nothing about producing medical records is a "one-size fits all" situation, so if you have a scenario that doesn't quite fit the traditional circumstance or if you just need clarification, please don't hesitate to contact us for guidance.

METHOD IN THE MADNESS

A records request can come in several different forms: court order, subpoena duces tecum, HIPAA authorization, or in the case of a deceased relative where no estate has been opened, in the form of an heirship affidavit.

Court Order

If the request comes as a court order, which will be signed by a judge, you

may produce the records in accordance with the terms of the court order. However, take care to disclose only the information specifically described in the order. For example, if the order commands you to produce John Doe's medical records from June 1, 2005, to June 1, 2006, you should not produce John Doe's entire chart which began with his first visit to your office on April 15, 1999. Similarly, unless the court order directs you to send the records to the judge, don't send the records to the judge, the judge's assistant, or the courthouse. If you do, the judge will be less than amused. Rather, carefully read the order and send the records to whomever you are directed within the time period you are allowed.

Subpoena Duces Tecum

The other most common method for requesting medical records is a subpoena duces tecum. Unlike a court order, a subpoena is not signed by a judge but

is issued either by a court clerk or by an attorney. As is the case with a court order, only disclose the information that is responsive to what the subpoena requests and only send the information to the party which you are directed. One caveat that applies with a subpoena is that you should receive, along with a copy of the subpoena, evidence that the party issuing the subpoena made reasonable efforts to notify the patient about the request so that the patient had a chance to object to the production. If you don't receive this information and are unsuccessful in obtaining it from the party that served the subpoena, you may call the patient directly and explain the situation. If you receive no objection from the patient, you may produce the records in response to the subpoena. However, in this circumstance, take care to document all of your steps to obtain evidence that the patient was given reasonable notice.

HIPAA Authorization

Next, records may be requested via a HIPAA authorization. The core elements of a HIPAA-compliant authorization are these:

1. a meaningful description of the information to be disclosed
2. the name of the individual authorized to make the disclosure
3. the name of the recipient of the information
4. a description of the disclosure's purpose
5. an expiration date
6. a signature of the patient or patient's representative

As long as the authorization contains these six elements, it is valid, and you must produce records in response. In other words, you may not withhold production of the records simply because you are presented with a HIPAA form that looks differently than that which has been approved for use in your clinic. Again, follow the instructions on the form insofar as what and to whom to produce and the time period in which to do so.

Heirship Affidavit

In the event of a deceased patient where no estate has been opened, you may produce medical records to up to three heirs of the decedent if you receive a valid heirship affidavit pursuant to Miss. Code Ann. §41-10-3. This affidavit simply needs to attest to the fact that the heir is over 18 and of sound mind; is a relative and heir of the decedent; and no estate has been opened. Importantly, if an estate is later opened, the executor/executrix of the estate will be authorized to obtain medical records on the decedent's behalf.

PERSONAL REPRESENTATIVES

A personal representative in the HIPAA context is one who stands in the shoes of the patient and has the ability to act

for and exercise the rights of the patient. So, if the patient is an adult or an emancipated minor, the personal representative is any person having legal authority to make healthcare decisions on behalf of the patient. For example, this would include a person that has a healthcare power of attorney or a general power of attorney that specifically includes the power to make healthcare decisions.

When dealing with an unemancipated minor, a minor that is under the age of 18 or unmarried and who has not been emancipated by a court, the parents are, in general, deemed the personal representatives. However, when state law permits a minor to consent to certain treatment, the parents are not the personal representatives. For example, in Mississippi, a minor who is at least 15 years old may consent to drug and alcohol treatment. Similarly, a female minor of any age, if pregnant, is authorized under Mississippi law to consent for herself in connection with pregnancy and childbirth. Therefore, the parents of any minor who so consents in these circumstances are not necessarily entitled to obtain medical records of such treatment.

If a patient dies, the personal representative is the executor/executrix of the estate. If no estate has been opened, the personal representative is any heir, up to a total of three, that completes a valid heirship affidavit pursuant to Mississippi law.

FEE FRAMEWORK & FORMAT REQUESTS

It is acceptable to pass along reproduction costs to the party requesting records. Generally, those parameters listed below, which are established by the Mississippi Legislature in Miss. Code Ann. §73-43-11, are permissible:

1. \$20.00 for pages 1-20
2. \$1.00 per page for the next 80 pages

3. 50¢ per page for all pages thereafter
4. 10% of the total charge may be added for postage and handling

However, while Mississippi law permits you to charge a retrieval fee, HIPAA expressly forbids this. Consequently, retrieval fees should never be charged.

Also, if a party requests records from you in a format that differs from the medium in which you maintain them, you may be required to produce the records in the requested format if it is readily producible in that form. For example, if you maintain only electronic copies and the party requests paper copies, you should be prepared to compile paper copies of the requested records.

Most importantly, you may not withhold or deny access to medical records because a patient has an outstanding balance for healthcare services.

CONCLUSION

The very worst thing you can do once you get a records request is nothing. There are real financial and legal consequences for not complying with a records request at all or in doing so improperly. Having defended healthcare entities in contempt actions for failing to produce records, I can tell you that most judges have very little, if any, sympathy for such issues. Likewise, waiting until the last possible minute to evaluate a records request typically does not end up accomplishing anything other than increasing both your stress level and the chance that you will make a mistake. So, carefully consider every request that comes to your office when it arrives in your office, and if you have concerns or questions about the legitimacy of the request, call us as early in the process as you can.

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CYBER LIABILITY

The Ugly Truth and How We Can Help

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When a cyber attack endangers patients and puts our insureds at risk for a medical malpractice claim, we become very interested. Cyber attacks have the potential to affect the quality of care provided by our insureds, and the attack often comes from a source outside your control – a third party vendor, a stolen laptop, data easily accessible because of a poor password. It is not just the care you provide (and control) that is under attack.

We understand how unnerving this new risk can be to our insureds. For the past several years, as part of your professional liability coverage with MACM, we have provided you with additional cyber coverage – secured from NAS Insurance Services (NAS) – that gives you protection in areas related to the unauthorized access to patient information and other sensitive data. Since we have offered this coverage, we have

had dozens of claims filed, with one breach affecting over 60,000 patient records.

With this cyber liability coverage comes online cyber training resources available on the NAS Insurance Services website – NAS CyberNET. Through this website, you can find information and

Experts now believe everyone will be hacked at some point. It is just a matter of when.

even ready-to-use tools to assist you in assessing your cyber system and identifying vulnerabilities. NAS has also done the heavy lifting of developing policies and procedures related to cyber liability issues. Additionally, the NAS CyberNET website offers short educational

videos on a variety of cyber-related subjects, awareness posters that can be displayed in your office, and recorded webinars that can be used for staff training. There are even forms prepared for your use such as a Vendor Agreement form and a Personal Device User Agreement. As if that is not enough, the coverage also includes HIPAA breaches (even if not related to cyber); and, the website includes related sample policies and forms.

The content of this article just scratches the surface on this very complex (and ever-changing) issue. Please use the information MACM and NAS can offer you to make it as difficult as possible for a cyber attack to be successful or for a privacy breach to occur. Those who have been affected can tell you it is much better to prevent a breach or attack than it is to contend with the fallout after one has transpired.