A joint publication of the Attorneys Fidelity Fund and the Attorneys Insurance Indemnity Fund NPC
(A Non Profit Company, Registration No. 93/03588/08)

RISKALERT

NOVEMBER 2015 NO 5/2015

IN THIS EDITION

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Attorneys Insurance Indemnity Fund (NPC)
Est. 1993 by the Attorneys Fidelity Fund

Attorneys Fidelity Fund
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RISK MANAGER'S COLUMN

WARNING!

We have previously (on numerous occasions) warned the profession about the *modus operandi* of scammers who perpetrate e-mail fraud against attorneys and conveyancers. Despite this, many practitioners and their staff continue to fall prey to the scammers and we are still frequently advised of these matters. *These scammers appear to be working in syndicates and to have inside assistance from the banks.*

Please take note: The Attorneys Insurance Indemnity Fund (AIIF) will, in future, not come to the assistance of your firm in these circumstances. As a precaution, you need to *educate* and *supervise* staff in order to avoid being placed in the position where, having made payment into a fraudulent bank account, you are obliged to pay out large sums from your own funds to the correct party. Practitioners may also consider speaking to their brokers about commercial policies that cover claims of this nature.

There is another very worrying phenomenon that we are frequently being notified of and which seems to be a growing trend. **Employees, especially trusted secretaries, are fraudulently giving their own personal banking details - instead of the practice's trust account details - to clients for the deposit of funds.**

A *Volksblad* report on 4 September 2015 tells the sad tale of a secretary, Janine Diedericks, who had been employed by

Ann Bertelsmann, Risk Manager

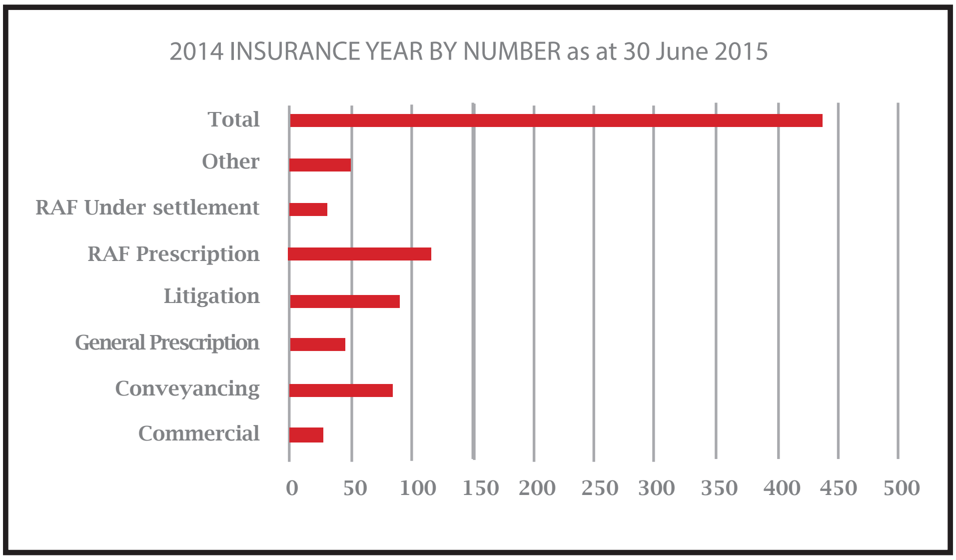
Honey Attorneys. She appeared in the Bloemfontein Regional Court on numerous charges of fraud (alternatively theft) to the tune of over R1 million and also three charges of money-laundering. It is alleged by the prosecution that she gave ninety-three clients the incorrect banking details for the firm's trust account, supplying them with her husband's bank account details instead. The funds were accordingly deposited by clients into Mr Diederick's bank account – apparently without his knowledge. In two instances, she allegedly also transferred money out of Honey Attorneys' trust account into her brother-in law's account. Diedericks is to appear in court again in November.

How is this allowed to happen? How can it be prevented? There are no easy solutions, but careful screening of staff and effective supervision are good places to start, especially in those areas where finances are being dealt with, such as collections departments. Routine file audits and regular checking of correspondence will also assist. There should be as many checks and balances in place as possible, even where a trusted employee is concerned.

RISK MANAGER'S COLUMN continued...

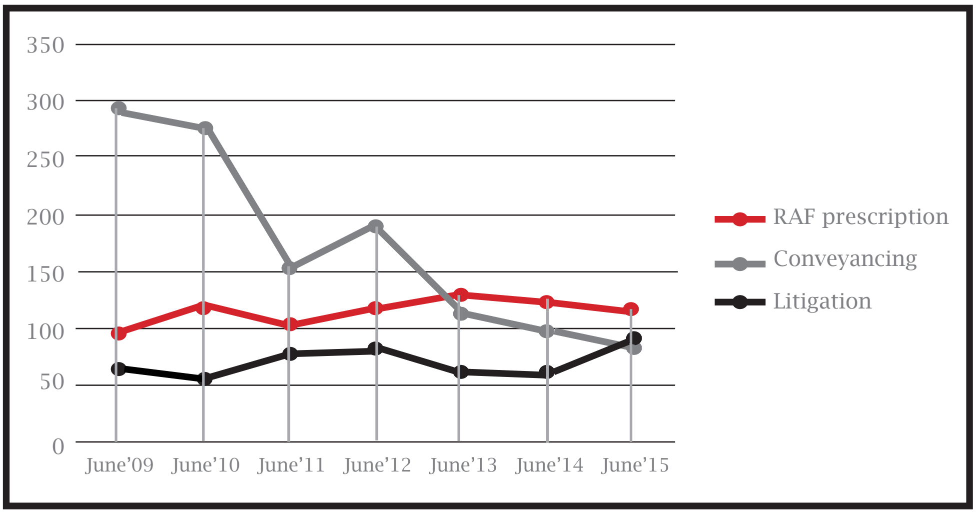
CLAIMS TRENDS AS AT 30 JUNE 2015

Graph 1: Number of claims by claim type (*at 12 months*)



As can be seen in in the 2014 insurance year as at 30 June 2015, claims arising out of *Road Accident Fund (RAF)* matters still dominate in number. C*onveyancing* matters are on a par with *litigation* claims as the next biggest source of claims.

Graph 2: 2008 to 2014 insurance years by NUMBER as at June (12 months)



Graph 2 illustrates that, historically, claims arising out of *conveyancing* matters were the most frequent - but that they have steadily reduced in number since 2009. On the other hand, claims arising out of *RAF prescriptions* have slowly increased since 2009, exceeding the number of conveyancing claims for the first time in 2013. There has been a substantial uptick in the number of claims arising out of *litigation* in the 2014 year, whereas they have been at a consistent level over the past five years.

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RISK MANAGEMENT

Introductory note on risk management

While practitioners may appreciate some of the risks in their own areas of responsibility, the practice's full spectrum of risks is often not appreciated. Practices need to take a holistic approach to managing their risks.

Broader risk management for any practice will incorporate issues like:

- Financial risks
- Practice management risks
- Operational risks
- Strategic risks
- Environmental risks

For any professional services firm, the greatest risk is to its biggest asset – its reputation. Attorneys' practices are no exception. In this article we focus more narrowly on practice management and particularly this reputational risk.

What follows is a **checklist** that we have developed in response to requests to the Attorneys Insurance Indemnity Fund (AIIF) from several practitioners, to provide them with some guidelines for drafting a Minimum Operating Standards (MOS) policy. These guidelines aim to facilitate client retention and assist in avoiding claims by clients, through the provision of an above-average legal professional service. (To a certain extent, they also encompass compliance and money-handling issues.)

Some of the positive spin-offs of the MOS should be:

- improved planning;
- greater certainty and predictability;
- a cohesive and more efficient work structure; and
- the facilitation of performance management.

When drafting your practice's MOS, it is advisable to refer back to your practice's mission statement. A legal practice's mission statement will usually include ideals like enhancing its reputation by providing a professional client service and ensuring client satisfaction.

Risk Management and Minimum Operating Standards

The MOS will focus on the importance of the roles of all employees, both professional and support staff. It should be updated and streamlined on a regular basis as circumstances change.

Once drafted, the MOS should be easily accessible to all staff, who should be trained to apply them. Compliance with the MOS should be regularly monitored and there should be sanctions for non-compliance. In this regard it may be worthwhile to appoint a compliance officer - if your practice is sufficiently large.

What should typically be covered in your MOS?

1 *General reputation*

These rules and standards will relate to the individual employee/principal's relationships with the regulators, the practice, internal and external colleagues and with the broader public. They should encompass issues like the use of social media, telephone and court etiquette, dress codes, written communications and staff meetings - to name but a few.

2 *Client engagement management rules and standards*

- First consultation: assessment of the client/conflict checks/ FICA rules/ POCA/assessment of the matter/ mutual expectations/ground rules/ checklist/ completion of information sheets/ projected costs and time period/the rule that all issues must be fully documented;
- Engagement/mandate letters: must outline the full contract between the practice and the client – a checklist for this should include billing policies/ rules of communication/the agreed

RISK MANAGEMENT continued...

mandate (there should be a uniform basic document used by the practice, together with a checklist, that can be tailored for particular clients and mandates and which must be updated as circumstances change. It must be signed by both parties.) **Please note the requirements of S35 of the Legal Practice Act 28 of 2014;**

- Non-engagement letters: must be given or sent to parties where the mandate is not taken on;
- Communication with client (and other parties): these rules might include frequency, content, style, proof of delivery/receipt, written recordal and confirmation;
- Client confidentiality/ethics/data protection rules;
- Client complaint procedures and dealing with difficult clients /third parties;
- Uniform billing policies; taking of deposits/ billing charges/ frequency/ payment terms/collections;
- Uniform rules on closing the engagement and the file.

3 *File/case management rules and standards*

- The use of checklists for matters (where appropriate) and working plans;
- Delegation rules: what can be delegated/to whom/the duties and responsibilities of the delegator and delegatee;
- Rules for the supervision of all colleagues, delegatees, junior employees and support staff;
- Settlement of matters;
- Opening files and uniform file order;
- Rules for and value of keeping appropriate file notes;
- Drafting documents, draft identification and maintenance;
- Checks and balances including compulsory file audits/proofreading/ checking of incoming and outgoing mail/separation of duties/ centralised diary system;
- Rules for the creation of and effective use of the practice's diary system and/or Prescription Alert;
- Rules for the creation and effective use of the practice's filing system;
- Information and document storage;
- Research and knowledge management;
- Rules for instructing counsel and experts;
- Rules for file-handover (from or to another firm or an attorney within the practice);
- **Strict rules for payment out, of any money deposited in the trust account**;
- Closing and storing files after finalisation.

4 *Trust account management rules (Many of these are captured in your Law Society's rules)*

- Strict separation of duties for EFT and cheque payments;
- Levels of authority and checks and balances in place;
- Strict password and pin security in place;
- Controlled access to computers;
- Strict rules and procedures relating to recipients' bank account details (eg. FICA the recipient) and more importantly any changes to a recipient's bank account detail (re-FICA the recipient);
- Extraction and balancing of accounting records at least on a quarterly basis, preferably monthly;
- Extraction of trust creditors listing at least quarterly, preferably monthly;
- No debit balance on each of the trust creditors accounts at any given point;
- No deficits on the aggregate balances at any given point;
- Maintenance of accounting records and their supporting documents, including proof of EFT payments and returned paid cheques from the banks, for a period of at least 5 years following the last entry into the records;
- Strictly defined processes/procedures/checks and balances for payment requisitions and both EFT and cheque payments;
- Strictly defined procedures for journals authorisations and recording thereof;
- Strictly defined procedures for transfer of fees from trust account to business account and maintenance of fee schedules;
- Monthly trust bank reconciliations for each of the trust accounts;
- No payments out of suspense account - funds to be first identified and allocated to the correct account before payment is done;
- Funds remaining unidentified or unallocated in suspense for a period of 2 years and more - to be paid over to the AFF;
- Declaration of income received and correct determination and payment to SARS of income tax and VAT;
- Payment of interest (s78(1) and s78(2)(a) accounts to the AFF on a monthly basis. (Beyond 2017, include levy on s78(2A) interest);
- Maintenance of a valid FFC
  - — Annual audit, with no qualification
  - — Attorneys statement on trust account.

5 *Staff professional development rules*

- Staff recruitment and training;
- Performance management;
- Continuing professional development.

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(Many thanks to Simthandile Myemane of the Attorneys Fidelity Fund for her contribution to the section on trust account management rules.)

RAF and RABS: Some case studies

The aim of this article is to look at the components of an RAF claim that are actuarially calculated and how the value of these benefits will be impacted under RABS. We consider two Loss of Income (LOI) case studies as well as a Loss of Support (LOS) case study. Other components of a typical claim such as general damages, medical and funeral costs are usually not actuarially determined and therefore not considered in further detail (although there are clear differences between RAF and RABS).

The Road Accident Benefit Scheme (RABS) is proposed as a replacement for the Road Accident Fund (RAF). The draft RABS bill was published in May 2014 and the following table on the right summarises some of the main differences:

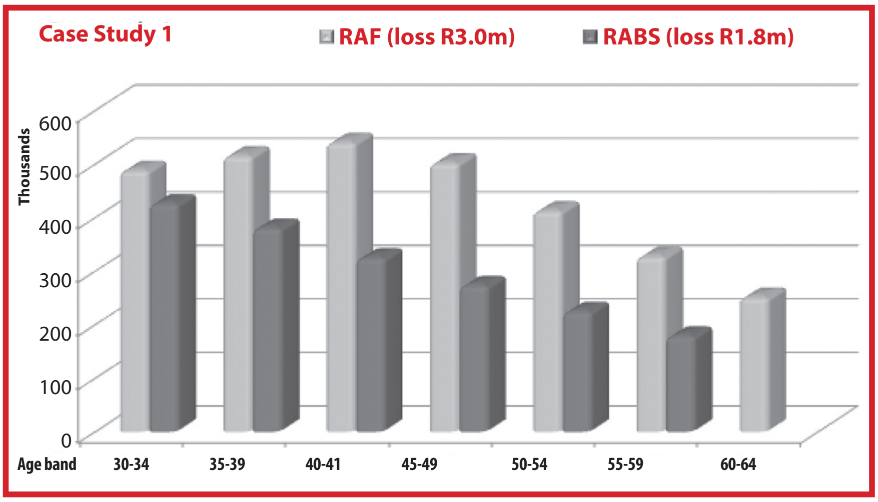
SYNOPSIS:
- **To compare by examples the actuarial components of a claim under RAF and RABS.**
- **To highlight groups of claimants that will be better/worse of under RABS and to touch on some broader issues.**

RAF	RABS
➢ Provides lump sum compensation.	➢ Provides regular, reviewable, defined payments (rehabilitation may be required).
➢ Fault based system.	➢ No-fault system.
COMPENSATION PROVIDED FOR:	
➢ Loss of income. ➢ Loss of support. ➢ Medical costs. ➢ Funeral claim. ➢ General damages.	➢ Income support benefit. ➢ Family support benefit. ➢ Health care services. ➢ Funeral benefit.

Case Study 1

Loss of income (office worker)		*Accident date:* 2015 *Age at accident:* 30 *Earnings- Uninjured:* R100 000 pa in 2015, R200 000 pa at age 45 *Earnings- Injured:* Unemployable *Expected retirement age:* 65

The graph below illustrates the loss profile (in current terms) in 5-year intervals, under RAF and RABS respectively. A comparison of the total loss is also provided:



Key points

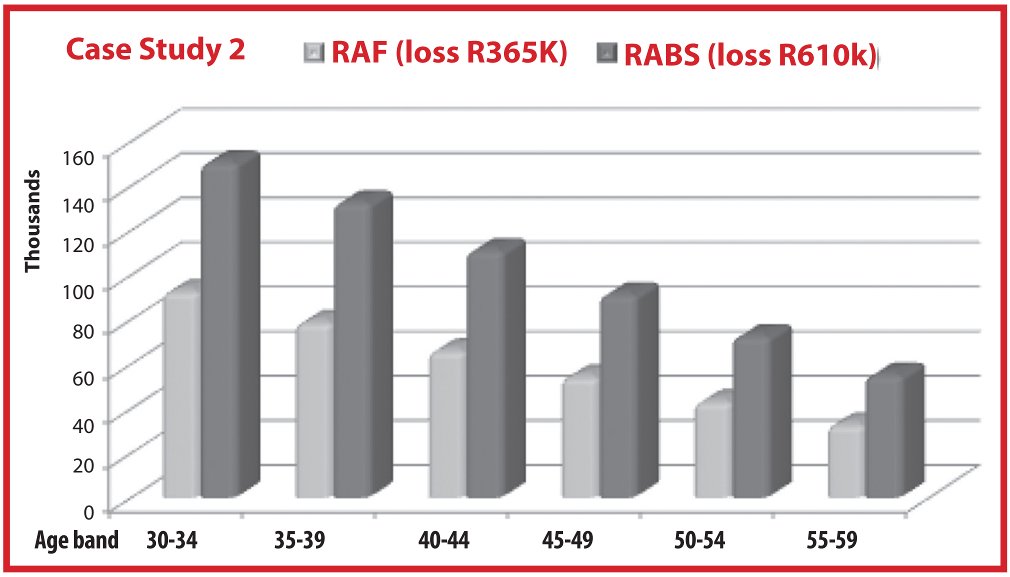
- ➢ RAF losses are higher throughout.
- ➢ RAF: allowance is made for promotional growth; RABS: no promotional allowance.
- ➢ RAF: benefits cease at assumed retirement age of 65; RABS: benefits cease at 60.
- ➢ RAF: loss based on full earnings; RABS: loss roughly based on 75% of earnings.
- ➢ RAF: no waiting period; RABS: no compensation for 1st 60 days (waiting period).

RAF MATTERS continued...

3. Case Study 2

Loss of income (unskilled worker)		*Accident date:* 2015 *Age at accident:* 30 *Earnings- Uninjured:* R20 000 pa *Earnings- Injured:* Unemployable *Expected retirement age:* 60

The graph below illustrates the loss profile (in current terms) in 5-year intervals, under RAF and RABS respectively. A comparison of the total loss[1] is also provided:



Key points

RABS losses are higher throughout.

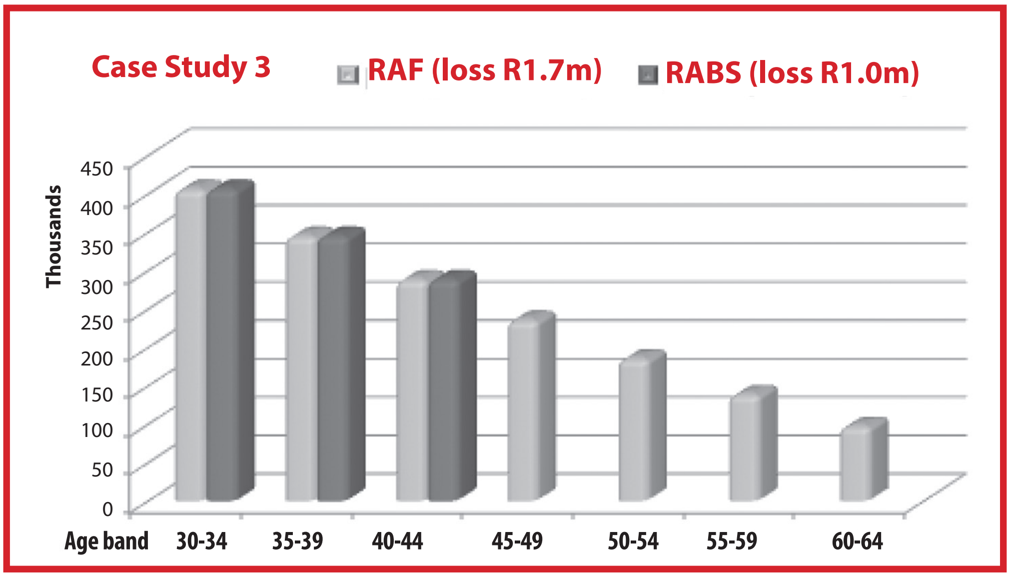
- RAF: loss based on actual earnings; RABS: loss based on 75% of Average Annual National Income (AANI) (AANI is R43 965 pa in 2014 terms)
- AANI will apply as minimum earnings under RABS, including the unemployed or economically inactive individuals.

Case Study 3

Loss of support (surviving spouse)		*Accident date:* 2015 *Deceased's age at accident:* 30 *Spouse's age at accident:* 30 *Deceased's earnings:* R200 000 pa *Spouse's earnings:* Nil *Expected retirement age:* 65

The graph on the next page illustrates the loss profile (in current terms) in 5-year intervals, under RAF and RABS respectively. A comparison of the total loss is also provided (The RABS compensation is paid in instalments, but for illustration has also been capitalised on the same basis to aid comparison. Under RAF no allowance was made for contingencies or merit apportionment and under RABS it was assumed the payments would increase by inflation, but would not be altered, stopped or suspended.):

RAF MATTERS continued...



Key points

- ➢ RAF total loss exceeds RABS total loss (but similar for the first 15 years).
- ➢ RAF: compensation ceases after 35 years (when Deceased would have retired at age 65).
- ➢ RABS: compensation ceases after 15 years.

RABS impact on various groups

The following table illustrates some groups of claimants that may be better or worse off under RABS:

Worse off	Better off
➢ Individuals with anticipated career growth. ➢ Individuals with no or low earnings but anticipated to exceed AANI e.g. students, children. ➢ If expected retirement after age 60 (LOI). ➢ LOI based on only 75% pre-accident income. ➢ LOI where individual is able to work (post-accident earnings, inclusive of career growth, will be offset against RABS benefits). ➢ If dependency is longer than 15 years (LOS). ➢ Children dependent beyond age 18 (LOS). ➢ RABS does not guarantee inflation linked benefits. ➢ Those unable to prove earnings (if higher than AANI). ➢ Individual with benefits not necessarily reflected on a payslip e.g. medical subsidies, free housing. ➢ Overseas visitors, SA citizens not based locally. ➢ Capping is more severe under RABS and could eliminate loss.	➢ Individuals not covered under RAF e.g. • At fault individuals; • Broader class of vehicles covered; • Self-inflicted injuries (but creates moral hazard); and • Illegal activities covered. ➢ Unemployed, economically inactive or those earning below AANI. ➢ Extended family of a deceased victim.

Concluding remarks

The three simple case studies and table above illustrate that RABS will benefit some claimants but also penalise others. In practice many more complications arise, for instance when considering a loss of income case where there is residual earning capacity, a loss of support case where the surviving spouse is also working etc.

It is not yet clear what the final RABS benefits will look like, and if any of the above issues will be addressed. As it stands, the RABS bill has a number of consequences for claimants, some intended but some appear unintended.

Finally, a number of important questions remain to be answered which include the following:

- ➢ Cost: Will RABS be cheaper and more cost effective than RAF?
  - • Some features will increase costs e.g. no-fault, introduction of AANI (which could significantly increase average claim size for a large portion of low income claimants).
  - • Some features will reduce costs e.g. reduction in certain benefits, inflation protection is not guaranteed, and the impact of capping is more severe.
  - • The net impact of the above is dif-

RAF MATTERS continued...

ficult to predict or model.

- Funding: RABS is intended to be fully funded, at the same time RAF will be in run-off for a number of years requiring parallel funding.
- The medical tariffs under RABS have not been published. It is not clear if any agreements are in place with service providers yet.
- Are the relevant infrastructure and agreements in place to provide rehabilitation and related services? Will rehabilitation reduce the cost of claims, or be wasteful expenditure when unsuccessful?

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We thank Mr Loots for allowing us to republish this article from his Newsletter May/June 2015.

Adjustment of the statutory limit for loss of income/loss of support as at 31 July 2015

BOARD NOTICE 141 OF 2015: In accordance with section 17(4A)(a) of the Road Accident Fund Act, Act No. 56 of 1996, as amended, the Road Accident Fund adjusted the amounts referred to in subsection 17(4)(c) to **R234,366.00**, with effect from 31 July 2015.

NEWS FLASH

Warning! Loan Sharks

We have been advised by several practitioners that, as a result of the RAF's failure to timeously honour settlements, desperate clients (and sometimes their attorneys) are falling prey to loan sharks who will pay the client a portion of the settlement amount upfront at an exorbitant fee and interest rate - and subject to an undertaking by the attorney.

We recommend that you advise your client against this practice – and if they still wish to take the loan, we also recommend that you refuse to be involved in the transaction. If you fail to honour the undertaking, you could find your practice liable to pay the bridging finance company.

LETTERS TO THE EDITOR

I note in last month's Risk Alert that you may be able to provide me with a standard checklist for a file audit. May I request you to furnish me with such a checklist please?

Then, while I am writing, do you perhaps have a master "Minimum Operating Standards" for a small firm from which I might start to draw up a proper one for our office?

Thanks

(Name withheld)

We have responded by sending the reader our standard checklist for file audits and by writing the article that appears on page 3.