

Don't Let Archiving Integration Costs Surprise You During M&As

By Susan Hall

4 March 2010

IT Business Edge

Susan Hall spoke with George May, vice president of product strategy for **Kroll Ontrack**, which specializes in data management, legal technologies and litigation consulting. May explained that during mergers and acquisitions, it's become imperative to address how you'll merge the two companies' archiving systems.

Hall: Who within the company takes ownership of this process and who is involved?

May: It's kind of like a marriage. One of the things people have to decide is: How are you going to run your finances? Are we going to share everything? Is there going to be some separation involved? Sometimes people look at the impending union and decide their existing practices aren't going to really work, so they decide they're going to need something new for the combined entity. Each side has a set of practices and often the acquiring entity tends to think its practices are the stronger one because they're a bigger company. But that isn't always true. So this provides an opportunity to reinspect that and see what's taking place.

There's a lot of work in the executive suite, but the particular tasks tend to fall on a handful of people: the general counsel or someone from that office. Sometimes they call on outside counsel if they're in a very heavily litigated industry, for instance, especially if there are already matters percolating that people have to see through. Larger organizations often have compliance officers or a compliance department. The other people at the table are from the records management function and also the IT department. It tends to be quite a stew to cook together, but that tends to be who's around that table.

Hall: Is it really common for the two companies to decide to maintain separate systems?

May: It's really an opportunity for them to step back and say, "Do we really have the better of two practices here? Or are we really not thrilled with either one of them?"

It starts with whether there are any systems in place or investments they've made and whether they feel they're getting back what they need from those investments. Sometimes, people will say, "You know, we spent some money on some software and some services, but we're not really getting what we need out of that." We run into this quite often in our consulting practice: People own a solution, but they haven't really rolled it out. They have very limited retention rules in place or one rule that's applied to the entire organization and it really isn't advancing the cause for them. They're not retaining what they should be, they're not disposing of what they should be. There's no variation for who's involved or which department's doing what. That's one of the things that needs a fresh look when you're in a new situation. The acquired organization might have the better set of practices.

Hall: So how do they go about integrating systems, if they decide that's what they want to do?

May: Sometimes there's a task force around compliance and records management that gets formed. They will compare the workings of the acquiring and acquired companies and begin to figure out whether they've got the right set of practices going forward. A lot of times this is dished off to a consulting organization. We get involved in a lot of that. ... On litigation matters, that's what people really worry about: "What is our exposure here? What is our risk? Are we going to be adding to that or subtracting from that as we decide what our practices are going to be?" ...

Sometimes when the two companies are from two different sectors of a large industry, and they don't have anything similar in the way they've been practicing at all, that's when they say, "Let's roll back and look at everything we're doing to see if that's the way it ought to be." That's more likely to happen with equals or two sizeable companies. It is less likely with a very large organization absorbing a much smaller

one. Unless there's a lot of litigation risk or a lot of particulars that need to be looked at, the acquiring company's practices tend to be adopted and people tend to not want to revisit the issue at all.

Hall: It seems like this could be fertile ground for cultural differences. Even finding a common language could be a real issue.

May: You're absolutely right. Some real eye-opening things can happen. ... Sometimes you find that a company is acquiring a property and realizes that no one has thought about this issue at all. They get into it and realize, "We looked at the financials, we looked at the assets we're acquiring and now we see a different set of things to deal with." And people need to be cognizant of that because there are costs involved and additional risks that people might not have been attending to when they were just looking at "what are we spending to acquire this company?" ...

But it's good to know you're not alone in the world. The good news is that if you lack the background within your own organization to deal with this, there are plenty of places to turn ...

Hall: Are there any particular pitfalls in merging two archiving systems – things just waiting to go wrong?

May: We talked about one: Going into an acquisition without even thinking about this. Sometimes someone will acquire some important IT or something that's in a new industry. It might be tech-related or pharmaceutical or energy-related and that might not be their core business, but they realize, "We're playing this game now. This acquisition puts us in that space. It's time to think about what that means to us."

In acquisitions, some things are always thought out: How much are we paying? What assets are we getting? What will happen to the [employees]? What will happen to the real estate? This particular issue only in the past few years has been added to the list of things people need to worry about every single time. A lot more people are following this conversation than used to be, though, so fewer people are getting surprised.

Hall: I would imagine it would be very interesting to be served with some e-discovery request in the midst of all this, when you don't have things worked out.

May: It can get very sensitive. ... It would not be unprecedented for issues in this area to cause somebody to step back and say, "Look, we like the numbers, we like the people and it's a good addition to the business, but there's a hornet's nest waiting for us over here and if we don't see a clear way of working it out, we may just have to pass on this thing." Most people work through this. General counsel's take on due diligence is a very important part of things – going over the agreements, going over the risks – and now adding retention and destruction policies to that to see if people have paid attention there.

Hall: Are there any steps companies can take to mitigate these problems?

May: We rather selfishly suggest they call outside professionals to advise them on the situation. The advantages are several: You get a broader range of experience, and probably the more important benefit is that someone from outside can be more dispassionate about it. They're not particularly wedded to the practices of company A or B. They're in a better position to advise on a best-practices level and they're in a position to get people away from doing what they've been doing. Third, it provides you with that referee function. If someone's going to blow the whistle and say, "You really need to think differently," or "We suggest you try something else," sometimes if you're part of company A or B, it's hard to say something to make that happen. But if somebody is coming from outside the story, everybody has to listen and take it seriously. They can say things that other people in the room might not be comfortable saying.

Hall: So do companies' archiving practices and policies have to change when they're merging two systems?

May: They do. A lot of the clients we work with on a compliance or e-discovery matter, when we look at

the policies they have in place – and this is true even when there is no acquisition – is that what got set up was set up because of some IT-related needs. They may say that the e-mail they're managing is just exploding and they've got to drive that cost down, so they'll install some software or set up a retention policy to take that ocean of information down to a river size. That's not necessarily the approach they want to take in regard to risk. They need to step back and look at what the appropriate regulations in their industry are. ... They might be keeping more than they need to, they might be getting rid of things that they should be keeping.

And if you look at how some of the federal courts have ruled around discovery issues – and we deal with this all the time – folks will say that at any point you had reasonable expectation that litigation or some sort of dispute was about to ensue, you are obligated to preserve information related to that matter. Folks don't get away with saying, "I didn't think this mattered and I got rid of it." Ignorance will not excuse you, and you need to have the systems and know-how in place to do these things.